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# Killing in the Fog of War

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# KILLING IN THE FOG OF WAR

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## ABSTRACT

How certain must a soldier be that a given individual is a combatant and not a civilian before attacking that individual? In the absence of clear legal rules, leading states, scholars, and practitioners have embraced a Balancing Approach, according to which the required level of certainty varies with the balance of military and humanitarian considerations. However, the Balancing Approach ignores the moral asymmetries between killing and letting die and between intentionally and unintentionally killing civilians. As a result, the Balancing Approach permits soldiers to intentionally kill individuals who are probably, much more likely, or almost certainly civilians rather than combatants.

This article develops a deontological alternative to the Balancing Approach. According to Deontological Targeting, a soldier may not intentionally kill an individual whom she believes is a civilian or whom she does not reasonably believe is a combatant. These constraints establish a minimum threshold of certainty that soldiers must reach before using deadly force. Furthermore, if an individual does not pose an immediate threat then, except in rare cases, that individual may not be attacked unless there is conclusive reason to believe that she is a combatant. In addition,

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soldiers must seek additional information regarding potential human targets unless seeking additional information would increase the risk to the soldiers substantially more than acquiring additional information would decrease the risk to civilians. If soldiers are unwilling or unable to take the risks necessary to achieve the required level of certainty then they must hold their fire.

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## INTRODUCTION

*The great uncertainty of all data in war is a peculiar difficulty, because all action must, to a certain extent, be planned in a mere twilight, which in addition not infrequently—like the effect of a fog or moonshine—gives to things exaggerated dimensions and unnatural appearance.<sup>1</sup>*

*The point is that we're Marines. We're the toughest guys on the block. We know how to defend ourselves. We know how to aggressively take people down. And to suggest that we can't do the shades of gray in between is a cop-out, and I think it sells Marines short.<sup>2</sup>*

Imagine that you are a soldier, ordered to protect a military or diplomatic convoy as it passes through hostile territory, and you see a car stopped by the side of the road ahead. Or imagine that you are stationed at a security checkpoint and a car approaches despite signs and warnings directing it to stop. The occupants of the car may be civilians, but they may also be irregular forces waiting to attack. Or imagine that you are sitting safely in an office, or on an airbase, piloting an Unmanned Aerial Vehicle (UAV) by remote control, trying to determine whether the individuals you see on your monitor are members of an implacable insurgency or merely locals carrying arms for their own protection in a dangerous area. Finally, imagine that you are the President of the United States and that a team of intelligence analysts informs you that they are “between forty and sixty per cent” confident that Al Qaeda leader Osama bin Laden is living in a residential compound in Abbottabad, Pakistan, surrounded by civilians.<sup>3</sup>

<sup>1</sup> CARL VON CLAUSEWITZ, *ON WAR* Book 2, Chapter 2, Paragraph 24.

<sup>2</sup> Interview with Col. John Ewers, Staff Judge Advocate, 1st Marine Expeditionary Force, *FRONTLINE: RULES OF ENGAGEMENT*, PBS (Feb. 19, 2008), <http://www.pbs.org/wgbh/pages/frontline/haditha/etc/script.html#ixzz1eBd8soBh>.

<sup>3</sup> Nicholas Schmidle, *Getting Bin Laden: What happened that night in Abbottabad*, *NEW YORKER*, Aug. 8, 2011, [http://www.newyorker.com/reporting/2011/08/08/110808fa\\_fact\\_schmidle?currentPage=all](http://www.newyorker.com/reporting/2011/08/08/110808fa_fact_schmidle?currentPage=all).

What should you do? How certain must you be that the individuals in front of you are opposing combatants, rather than civilians, before using deadly force? What precautions must you take, what information must you seek, and what risks must you accept in order to reduce the risk of mistakenly killing civilians? How can the law of armed conflict, as well as the rules of engagement promulgated by your armed forces, provide better guidance to you as you make such determinations?

The urgency and importance of such questions is particularly clear in irregular armed conflicts in which state armed forces face non-uniformed adversaries intermingled with civilian populations. Moreover, recent scholarship suggests that as many as 7 out of 10 civilian deaths caused by U.S. armed forces in pre-planned military operations result from a failure to verify that the target of the operation is military rather than civilian.<sup>4</sup> Finally, the advent of UAVs creates an unprecedented opportunity to submit target verification to determinate and morally defensible legal rules.

To provide moral and legal guidance to participants in contemporary conflicts, this article deploys concepts and theories drawn from the law of armed conflict, decision theory, criminal law, and moral philosophy. It is, in that sense, a work of both intradisciplinary and interdisciplinary legal scholarship.

As Part I explains, under the law of armed conflict (LOAC), also known as international humanitarian law (IHL), soldiers are not permitted to shoot first and ask questions later. On the contrary, soldiers must *distinguish* between opposing combatants and civilians; *do everything feasible to verify* that the individuals they target are combatants and not civilians; consider individuals to be civilians *in cases of doubt*; and hold their fire *if it becomes apparent* that a targeted individual is a civilian. However, as the International Committee for the Red Cross (ICRC)—a leading expositor of IHL—has commented, “the various provisions are relatively imprecise and are open to a fairly broad margin of judgment.”<sup>5</sup> In the absence of clear legal rules, the ICRC as well as several leading states, scholars, and practitioners embrace what I will call ‘the Balancing Approach’, according to which the required level of certainty varies with the balance of military and humanitarian considerations. As the balance

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<sup>4</sup> Gregory S. McNeal, *The U.S. Practice of Collateral Damage Estimation and Mitigation* (unpublished).

<sup>5</sup> Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, at 679 (Yves Sandoz et al. eds., 1987) [hereinafter Protocol I Commentary].

tips in favor of humanitarian considerations, the required level of certainty rises; as the balance tips in favor of military considerations, the required level of certainty falls.

As Part II explains, the Balancing Approach remains imprecise and undertheorized. To date, no proponent of the Balancing Approach has attempted to show how one could derive a specific level of certainty from the balance of military and humanitarian considerations. Interestingly, decision theory provides a method for deriving a precise level of certainty from the relative costs of an erroneous decision. Unfortunately, by making the Balancing Approach more precise we also reveal its serious flaws. Most dramatically, the Balancing Approach ignores the moral asymmetries between killing and letting die and between intentionally and unintentionally killing civilians. As a result, the Balancing Approach permits soldiers to intentionally kill individuals who are probably, much more likely, or almost certainly civilians rather than combatants.

Part III develops an alternative approach to target verification that I call ‘Deontological Targeting’. The moral and legal prohibition of intentionally killing civilians entails that it is impermissible for a soldier to intentionally kill an individual whom she believes is a civilian or whom she believes is probably a civilian. Most importantly, I argue that it is both unjustifiable and inexcusable for a soldier to intentionally kill a human being whom she does not reasonably believe is a combatant. Reasonable belief that an individual is a combatant therefore constitutes a minimum threshold of certainty that soldiers must achieve before using deadly force. Above the reasonable belief threshold, the required level of certainty reflects the moral asymmetry between killing and letting die. Except in rare cases, an individual who does not pose an immediate threat may not be attacked unless there is conclusive reason to believe that she is a combatant. I conclude by comparing my approach with a recent proposal by Lt. Col. Geoffrey Corn.

Part IV argues that soldiers must accept any personal or operational risks necessary to achieve the required level of certainty. If soldiers are unable to reach the required level of certainty, or if they are unwilling to accept the risks necessary to do so, then they must hold their fire even if their forbearance will leave them at greater risk. Soldiers also have a general moral obligation to take additional precautions to avoid mistakenly killing civilians, including acquiring additional information regarding potential targets, unless taking those precautions would increase the risk to the soldiers substantially more than taking those precautions would decrease the risk the soldiers impose on civilians. In developing the latter argument I engage critically with important recent work by David Luban.

Part V distills the moral principles defended in the previous sections into new LOAC/IHL rules as well as reinterpretations of existing LOAC/IHL rules. These legal rules are then translated into model Rules of Engagement for training soldiers and guiding their conduct on the battlefield. Properly trained soldiers generally will make better decisions by following these simplified rules than by following existing law or by attempting to engage in complex moral or legal reasoning while under fire. U.S. Rules of Engagement, which typically require ‘Positive Identification’ of targets with ‘a reasonable certainty’ are constructively criticized.

The proposed reforms provide civilians far more protection than they have received in recent asymmetric conflicts. Among other things, the reforms preclude ‘firing blind’ into cars, crowds, or dwellings; the creation of ‘free-fire’ zones as well as the declaration that an entire area or building is ‘hostile’ and on that basis killing its occupants without positively identifying each targeted individual as a combatant; as well as the ‘zero-risk’ policy of shelling buildings on the mere suspicion that the individuals inside are combatants without taking meaningful steps to find out. Neither force protection nor mission success can justify or excuse killing civilians in these circumstances.

No set of legal rules can replace human judgment, eliminate human error, or prevent armed conflict from claiming civilian lives. However, the proposed reforms provide superior guidance to commanders and soldiers as well as greater protection to civilians. If such progress is possible then it must be pursued.

\* \* \*

Two points of clarification are necessary before we begin. First, the moral principles defended and the legal rules proposed in this article apply to all participants in armed conflict who must determine whether an individual is a legitimate target or an illegitimate target.<sup>6</sup> However, for the sake of convenience, this article generally refers to *soldiers* who must determine whether an individual is a *combatant* or a *civilian*. Since

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<sup>6</sup> Legitimate targets include members of regular armed forces, members of organized armed groups who perform a continuous combat function, and civilians directly participating in hostilities. Illegitimate targets include civilians not directly participating in hostilities, religious and medical personnel, detainees and prisoners of war, as well as individuals who have surrendered or been rendered *hors de combat* by illness or injury. See generally ICRC, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (Nils Melzer ed., 2009) [hereinafter DPH GUIDANCE].



civilians directly participating in hostilities are legitimate targets, in these passages readers should understand ‘combatant’ to include civilians directly participating in hostilities and should understand ‘civilian’ to exclude civilians directly participating in hostilities.<sup>7</sup> This terminological clarification is important because in many contemporary conflicts the challenge is precisely to distinguish civilians directly participating in hostilities from civilians not directly participating in hostilities. The principles defended and rules proposed in this article apply with particular urgency to such contemporary conflicts.

In addition, for the purposes of this article, a soldier *intentionally* kills an individual only if it is the soldier’s purpose, goal, or conscious object to kill that individual. Such intentional killings of targeted individuals are the primary subject of this article. By contrast, a soldier who *knowingly* kills civilians as a side-effect of attacking a legitimate target is primarily beholden to the proportionality principle that I have discussed elsewhere.<sup>8</sup>

## I. DISTINCTION AND PRECAUTION

The LOAC/IHL requires that soldiers distinguish between opposing combatants and civilians and take precautions in attack to avoid mistakenly killing civilians. These requirements receive their clearest expression in Additional Protocol I to the Geneva Conventions but several are also recognized as rules of customary international law. As we shall see, the indeterminacy of these requirements has led leading states, scholars, and practitioners to adopt a Balancing Approach to target verification, according to which both the required level of certainty and the required level of precaution varies with the balance of military and humanitarian considerations.

### A. DISTINCTION

First, “[i]n order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict *shall at all times distinguish* between the civilian population and combatants and between

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<sup>7</sup> For example, the proposed rules would apply to a civilian intelligence operative covertly participating in armed conflict who must determine whether or not a civilian is directly participating in hostilities before attacking that civilian.

<sup>8</sup> See Adil Ahmad Haque, *Proportionality (in War)*, in THE INTERNATIONAL ENCYCLOPEDIA OF ETHICS (Hugh LaFollette et al. eds., 2012).

civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”<sup>9</sup> The principle of distinction is a well-established part of customary international humanitarian law.<sup>10</sup> The principle does not specify a level of certainty that soldiers must achieve or a level of risk they should accept to achieve that level of certainty. The drafting history provides little insight, as discussion of this principle focused on the varying technological capacities of different armed forces to distinguish between civilians and combatants, rather than on the level of certainty with which this distinction must be made.<sup>11</sup>

Protocol I also states that “[i]n the conduct of military operations, *constant care* shall be taken to spare the civilian population, civilians and civilian objects.”<sup>12</sup> The language of this provision, which suggests a legal duty of care owed by soldiers to civilians, might gesture toward a duty to accept some personal or operational risk to achieve an adequate level of certainty. According to the ICRC, “[t]his provision appropriately supplements the basic rule of Article 48 . . . which urges Parties to the conflict to always distinguish between the civilian population and combatants . . . . It is quite clear that by respecting this [latter] obligation the Parties to the conflict will spare the civilian population . . . .”<sup>13</sup> This comment is somewhat misleading and in any case unhelpful. Even if a soldier succeeds in distinguishing between civilians and combatants, she is hardly guaranteed to spare the former: among other things, the soldier must still select discriminating means and methods of warfare that can be directed at combatants and away from civilians. Conversely, if the soldier exercises adequate care then she cannot be faulted if her attempts to distinguish civilians from combatants do not succeed. But the comment tells us nothing about the level of care with which soldiers must attempt to distinguish civilians from combatants. As A.P.V. Rogers concludes, “[t]he

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<sup>9</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 48, June 8, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978) [hereinafter Protocol I] (emphasis added).

<sup>10</sup> See JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 3 (2005) (“Rule 1. The parties to the conflict must at all times distinguish between civilians and combatants.”).

<sup>11</sup> See Protocol I Commentary, at 599-600.

<sup>12</sup> Protocol I, art. 57 (emphasis added).

<sup>13</sup> Protocol I Commentary, at 680.

law is not clear as to the degree of care required of the attacker or the degree of risk that he must be prepared to take.”<sup>14</sup>

In the absence of clear textual guidance, several scholars have turned to the Balancing Approach to describe the required level of care. In perhaps the most influential contemporary work on the ethics of armed conflict, Michael Walzer writes that “the degree of risk that is permissible [for soldiers to impose on civilians] is going to vary with the nature of the target, the urgency of the moment, the available technology, and so on” and concluded “that civilians have a right that ‘due care’ be taken” which reflects the balance of the relevant variables.<sup>15</sup>

More recently, Matthew Waxman argues that soldiers should apply a flexible standard of ‘reasonable care’ according to which “reasonableness is judged in terms of costs to the attacker of performing more rigorous analysis or expending scarce military resources.”<sup>16</sup> As Waxman concedes, “the reasonable care rule is disquieting. It vests belligerents with considerable discretion in multifaceted balancing and legitimizes even large-scale injury to innocent civilians under certain circumstances.”<sup>17</sup> Specifically, if the standard of certainty is simply a function of the costs to an attacking force of mistakenly sparing an opposing combatant and the costs to a civilian of being mistakenly killed, then if the former even slightly outweigh the latter it would appear ‘reasonable’ for a soldier to attack an individual even if the soldier believes that individual is probably a civilian. As we shall see in part II, this disquieting implication of the Balancing Approach is the product of two more fundamental defects.

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<sup>14</sup> A.P.V. Rogers, *Zero-Casualty Warfare*, 82 INT’L REV. RED CROSS 165, 177 (2000).

<sup>15</sup> MICHAEL WALZER, *JUST AND UNJUST WARS* 156 (1977).

<sup>16</sup> Matthew C. Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365, 1387 (2008). See also Dakota S. Rudesill, *Precision War and Responsibility: Transformational Military Technology and the Duty of Care under the Laws of War*, 32 YALE J. INT’L L. 517 (2007).

<sup>17</sup> *Id.* at 1393.

## B. DOUBT

Second, Protocol I states that “[i]n case of doubt whether a person is a civilian, that person shall be considered to be a civilian.”<sup>18</sup> Since civilians are not legitimate targets, this provision entails that ‘in case of doubt whether a person is a civilian, that person’ may not be targeted. Although “[s]ome States have written this rule into their military manuals . . . [o]thers have expressed reservations about the military ramifications of a strict interpretation of such a rule.”<sup>19</sup> Indeed, if the provision is interpreted to mean that a soldier may never intentionally kill an individual if there is any reason to doubt that the individual is a combatant (that is, any reason to believe the individual is a civilian) then the provision would prove highly restrictive. It is worth noting, however, that the Protocol does not identify the degree of ‘doubt’ that would preclude a lawful attack. Moreover, the ICRC has not endorsed the provision as a rule of customary international law.

Tellingly, both France and the United Kingdom entered reservations to the Protocol I provision, with the United Kingdom stating that the provision “applies only in cases of substantial doubt” and with both countries stating that the provision cannot override “a commander’s duty to protect the safety of troops under his command or to preserve his military situation.”<sup>20</sup> In other words, both France and the United Kingdom maintain that it is lawful to attack an individual, despite substantial doubt that she is a combatant, if mistakenly sparing her (if she turns out to be a combatant) would jeopardize troop safety or mission success. The degree of doubt sufficient to preclude attack would therefore seem to vary based on the balance of military and humanitarian considerations.

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<sup>18</sup> Protocol I, art. 50 (emphasis added). *See also* Protocol I Commentary, at 611 (“According to the ICRC draft there was ‘presumption’ of civilian status, but this concept led to some problems and the Working Group decided to replace ‘presumed’ by ‘considered’.”)

<sup>19</sup> HENCKAERTS & DOSWALD-BECK, at 24 (citing the military manuals of Argentina, Australia, Cameroon, Canada, Colombia, Croatia, Hungary, Kenya, Madagascar, Netherlands, South Africa, Spain, Sweden and Yugoslavia). *But see id.* (citing the reservations of France and the United Kingdom).

<sup>20</sup> Reservation of the United Kingdom. *See also* Reservation of France. Rogers seems to accept a similar interpretation. *Cf.* Rogers, at 181 (“In the event of doubt about the nature of the target, an attack should not be carried out, with a possible exception where failure to prosecute the attack would put attacking forces in immediate danger.”)

In light of conflicting state practice, the ICRC found it “fair to conclude that when there is a situation of doubt, a careful assessment has to be made under the conditions and restraints governing a particular situation as to whether there are sufficient indications to warrant an attack. One cannot automatically attack anyone who might appear dubious.”<sup>21</sup> The quoted passage indicates that, according to the ICRC, the principle of doubt means only that a soldier may not intentionally kill an individual whom she is reasonably certain is a civilian just because there is some reason to doubt that the individual is a civilian or, put the other way around, just because there is some reason to believe that the individual is a combatant. This is, to put it mildly, a very low bar. To accommodate states that fear a restrictive interpretation of the principle of doubt, the ICRC adopted one of the most permissive interpretations possible. So interpreted, the principle seems to permit intentionally killing an individual who is most likely a civilian if there is a substantial possibility that she is a combatant (that is, more than a reasonable doubt that she is a civilian). In the vast majority of cases, this interpretation will prove far too permissive.

More recently, the ICRC has stated that the level of doubt that precludes attack is not fixed but rather varies with the possible consequences, for soldiers and civilians, of an erroneous decision:

Obviously, the standard of doubt applicable to targeting decisions cannot be compared to the strict standard of doubt applicable in criminal proceedings but rather must reflect the level of certainty that can reasonably be achieved in the circumstances. In practice, this determination will have to take into account, *inter alia*, the intelligence available to the decision maker, the urgency of the situation, and the harm likely to result to the operating forces or to persons and objects protected against direct attack from an erroneous decision.<sup>22</sup>

<sup>21</sup> HENCKAERTS & DOSWALD-BECK, at 24. *See also* Protocol I Commentary, at 612 (concluding that the principle of doubt “concerns persons who have not committed hostile acts, but whose status seems doubtful because of the circumstances. They should be considered to be civilians until further information is available, and should therefore not be attacked.”)

<sup>22</sup> DPH GUIDANCE, at 76.

Similarly, Ian Henderson writes that “[i]t cannot be expected that armed conflict will be reduced to the point where a commander can act only when he or she is 100 percent certain in all cases. Rather, the level of certainty should vary based on the consequences for the civilian population.”<sup>23</sup>

Finally, a recent document reflecting the consensus of a group of distinguished experts states that “[t]he degree of doubt necessary to preclude an attack is that which would cause a reasonable attacker in the same or similar circumstances to abstain from ordering or executing an attack.”<sup>24</sup> Notice that, in this formulation, the degree of doubt that would lead a reasonable attacker to abstain from attacking must vary based on the circumstances; otherwise, the reference to such circumstances would be superfluous. It follows that, in some circumstances, a reasonable attacker might attack even in the face of substantial doubt; in other circumstances, a reasonable attacker might abstain from attack in the face of even slight doubt. The group of experts does not adopt a fixed standard of certainty but rather adopts a variable standard. Unfortunately, the group of experts does not identify the relevant variables. However, it would be difficult to argue that a reasonable attacker would *never* consider the costs of an erroneous decision in deciding whether or not to attack despite some degree of doubt. So it would seem that the degree of doubt sufficient to preclude attack varies with the relative costs of error.

### C. VERIFICATION

Third, Protocol I states that “those who plan or decide upon an attack shall . . . *do everything feasible to verify* that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives . . . .”<sup>25</sup> This provision is also

<sup>23</sup> IAN HENDERSON, *THE CONTEMPORARY LAW OF TARGETING: MILITARY OBJECTIVES, PROPORTIONALITY AND PRECAUTIONS IN ATTACK UNDER ADDITIONAL PROTOCOL I*, at 164 (2009).

<sup>24</sup> COMMENTARY ON THE HPCR MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE 87 (2010) (hereinafter HPCR MANUAL COMMENTARY). *See also* Michael N. Schmitt, *Human Shields in International Humanitarian Law*, ISRAEL Y.B. HUMAN RIGHTS 17, 56-57 (20\_\_ ) (“In all cases of doubt, the appropriate international humanitarian law standard on the battlefield is whether a reasonable warfighter in [the] same or similar circumstances would hesitate to act based on the degree of doubt he harbored.”) Schmitt was one of the experts who contributed to the HPCR Manual.

<sup>25</sup> Protocol I, art. 57(2)(a) (emphasis added).

recognized as a statement of customary international law.<sup>26</sup> This provision raises at least two sets of questions. First, what level of certainty is required to ‘verify’ the legitimacy of a target? Is the legitimacy of a target verified if it is *probably* military rather than civilian, *much more likely* military than civilian, or *almost certainly* military and not civilian? Second, how much risk, if any, must soldiers accept to themselves or to the success of their mission in order to ‘do everything feasible’ to verify the legitimacy of their target? If the information soldiers already have or could safely acquire is insufficient to warrant the level of certainty required for ‘verification’ must they seek additional information at additional risk?

In its original commentary on Protocol I, the ICRC stated that “in case of doubt, even if there is only slight doubt, [those who plan or decide upon an attack] must call for additional information and if need be give orders for further reconnaissance.”<sup>27</sup> This comment suggests that the level of certainty required to verify the legitimacy of a target is extremely high, so high as to exclude even “slight doubt.” Moreover, the comment suggests that soldiers must engage in reconnaissance, accepting risks to themselves, to gather enough information to satisfy the required level of certainty. However, as we saw above, the ICRC no longer maintains that the LOAC/IHL requires such a high level of certainty but instead recognizes a variable level of certainty in keeping with the Balancing Approach.<sup>28</sup>

Although Protocol I does not define the phrase ‘everything feasible’, Protocols II and III to the Conventional Weapons Convention (CWC) state that “[f]easible precautions are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.”<sup>29</sup>

<sup>26</sup> See HENCKAERTS & DOSWALD-BECK, at 55 (“Rule 16. Each party to the conflict must do everything feasible to verify that targets are military objectives.”)

<sup>27</sup> Protocol I Commentary, at 680. See also *id.* at 681 (“The evaluation of the information obtained must include a serious check of its accuracy.”)

<sup>28</sup> See *supra* note 15 and accompanying text.

<sup>29</sup> Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II) art. 3(4), as amended May 3, 1996, 2048 U.N.T.S. 133; Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) art. 1(5), Oct. 10, 1980, 1342 U.N.T.S. 171. See also Lt. Col. William J. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 MIL. L. REV. 91, 108 (1982) (concluding, based on the statements of the United States, Germany and Italy during the drafting process, that “‘feasible’ in Article 57(2)(a) means ‘practicable or practically possible’”).

The ICRC has stated that the definition of ‘feasible precautions’ under the CWC Protocols provides the definition of ‘everything feasible’ under Protocol I.<sup>30</sup> Unfortunately, the CWC Protocols define the vague notion of what is ‘feasible’ in terms of the equally vague notion of what is ‘practicable or practically possible’ and a sweeping reference to *all* circumstances ruling at the time, *including* humanitarian *and* military considerations. In light of this indeterminacy, the ICRC now limits itself to stating that “[t]his determination [of feasibility] must be made in good faith and in view of all information that can be said to be reasonably available in the specific situation.”<sup>31</sup> No required level of certainty is proposed, and soldiers are not called upon to risk themselves or their mission to obtain additional information.<sup>32</sup>

In the absence of clear textual guidance, leading scholars have turned to the Balancing Approach to describe the precautions that soldiers must take to verify that their targets are military and not civilian. For example, Michael Schmitt argues that the “feasibility [of a precaution] must be interpreted by balancing humanitarian and military considerations. . . . By this analysis, the greater the anticipated collateral damage or incidental injury, the greater the risk [soldiers] can reasonably be asked to shoulder.”<sup>33</sup> Relatedly, a group of distinguished experts of which Schmitt is a member concludes that the feasibility of precautions often depends on

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<sup>30</sup> DPH GUIDANCE, at 75.

<sup>31</sup> DPH Study, at 75. *See also* YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL CONFLICT* 126 (2004) (characterizing the principle of verification as “an obligation of due diligence and acting in good faith.”)

<sup>32</sup> Similarly, the Advisory Committee to the Office of the Prosecutor for the International Criminal Tribunal for the Former Yugoslavia (ICTY) concludes that “[t]he obligation to do everything feasible is high but not absolute. A military commander must set up an effective intelligence gathering system to collect and evaluate information concerning potential targets. The commander must also direct his forces to use available technical means to properly identify targets during operations.” *See* Office of the Prosecutor, ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, para. 29 (June 13, 2000), available at <http://www.icty.org/x/file/Press/nato061300.pdf>. The Report does not address either the level of certainty required ‘to properly identify targets during operations’ or what risks, if any, soldiers are obliged to undertake in order to reach that level of certainty.

<sup>33</sup> Michael N. Schmitt, *Precision Attack and International Humanitarian Law*, 87 INT’L REV. RED CROSS 445, 462 (2005).



considerations of force protection, suggesting that the required precautions vary based on the weight of military considerations.<sup>34</sup> Similarly, Geoffrey Corn argues that the feasibility inquiry permits attackers to balance the risk to their own forces against the risk of mistakenly attacking civilians.<sup>35</sup> Finally, Matthew Waxman concludes that “[t]he responsibility to ‘do everything feasible’ [to verify the legitimacy of potential targets] . . . is generally interpreted to be not a fixed and always highly exacting duty—like, say, the beyond reasonable doubt approach of criminal law—but a balancing one: Parties are obliged to balance humanitarian concerns for civilians with military needs.”<sup>36</sup>

Before moving on, it is worth noting that many states have incorporated the principle of verification into their military manuals. Few states have identified the level of certainty, either fixed or variable, that qualifies as ‘verification’.<sup>37</sup> With respect to the level of risk soldiers must accept in order to achieve verification, most states simply follow Protocol I in requiring their forces to do everything feasible to achieve target verification<sup>38</sup>; some cast the requirement in terms of what is ‘reasonable’ or ‘practical’<sup>39</sup>; and some prefer different, but equally open-textured

<sup>34</sup> HPCR MANUAL COMMENTARY, at 136.

<sup>35</sup> See Major Geoffrey S. Corn, *Principle 3: Endeavor to Prevent or Minimize Harm to Civilians*, 1998 ARMY LAW 55, 55-56 (“Feasibility provides a limited mechanism to bypass applying certain rules related to minimizing civilian harm when application would be harmful to the force.”).

<sup>36</sup> Waxman, *supra* note 16, at 1388 (2008).

<sup>37</sup> A possible exception is Belgium, which instructs its forces that an object can be attacked only when it reasonably can be considered a military objective. See Belgium’s Teaching Manual for Soldiers.

<sup>38</sup> See, e.g., Australia; Canada; Kenya’s LOAC Manual (1997); New Zealand’s Military Manual (1992); UK LOAC Manual (2004); US Air Force Pamphlet (1976).

<sup>39</sup> See, e.g., U.S. DEP’T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE Appendix A-v (1956) (stating that “[t]hose who plan or decide upon an attack, therefore, must take all reasonable steps to ensure . . . that the objectives are identified as military objectives of defended places”); US Naval Handbook (1995) (“All reasonable precautions must be taken to ensure that only military objectives are targeted.”); Argentina’s Manual (“Those who plan or decide upon an attack shall, as far as possible, verify that the objectives to be attacked are not civilians, nor civilian objects, nor subject to special protection.”); Cameroon’s Instructors’ Manual (1992) (requiring that “those who plan or decide upon an attack do everything that is practically possible to verify that the targets to be attacked are

formulations.<sup>40</sup> Only two small states explicitly require that “[a]ll necessary measures must be taken to verify that the target to be destroyed is a military objective.”<sup>41</sup> However, a number of states impose an unqualified duty to verify the status of targets, which seems to imply that their forces must take all necessary risks to achieve the (unspecified) required level of certainty.<sup>42</sup> In addition, three states explicitly require reconnaissance, which generally places troops in harm’s way.<sup>43</sup> As these different instructions make clear, there is no consensus among states regarding either the level of certainty required for verification or the level of risk soldiers must accept to achieve verification.

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military objectives”); Ecuador’s Naval Manual (1989) (“All reasonable precautions must be taken to ensure that only military objectives are targeted.”).

<sup>40</sup> See, e.g., Israel’s Manual on the Laws of War (1998) (“In any attack it is imperative to verify that the attack will be directed against a specific military target.”)

<sup>41</sup> Benin’s Military Manual (1995); Togo’s Military Manual (1996). In addition, Denmark instructs its forces that “[c]ombatants must do everything in their power to verify that the objects to be attacked are not protected under IHL.” See Denmark Military Manual.

<sup>42</sup> See, e.g., France’s LOAC Manual (2001) (providing that those who plan or decide upon an attack must “verify that the objectives to be attacked are neither civilians nor civilian objects”), Germany’s Military Manual (1992) (“Before engaging an objective, every responsible military leader shall verify the military nature of the objective to be attacked.”), Hungary’s Military Manual (1992) (imposing a duty to “verify the military character of objectives and targets”), The Military Manual (1993) of the Netherlands (“During the selection of targets and the preparation of attacks, it must be verified that the objectives to be attacked are neither civilians nor civilian objects but are military objectives.”); Sweden’s IHL Manual (1991) (“The responsible commander shall verify that the attack is really directed against a military objective and not against [a] civilian population or civilian objects.”)

<sup>43</sup> See Spain’s LOAC Manual (1996) (“The military character of the objective shall be verified by reconnaissance and target identification.”); Italy’s LOAC Elementary Rules Manual (1991) (“The military character of the objective shall be verified by reconnaissance and target identification.”); Madagascar’s Military Manual (1994) (“The military character of an objective or target must be verified by reconnaissance and target identification.”)

## D. APPARENT PROTECTION

Finally, Protocol I states that “an attack shall be cancelled or suspended if it *becomes apparent* that the objective is not a military one or is subject to special protection.”<sup>44</sup> This provision is also recognized as a rule of customary international humanitarian law.<sup>45</sup> The ICRC remarks that “[t]he text is sufficiently clear for lengthy comment to be superfluous”<sup>46</sup> but there are at least two textual ambiguities that must be resolved. First, is it ‘apparent’ that an objective is civilian and not military if, given available information, it is *probably* (that is, *more likely*) civilian rather than military, *much more likely* civilian than military, or *almost certainly* civilian and not military? Second, does the provision apply only when the protected status of an objective is *subjectively* apparent to the actual attacker or does it also apply when the protected status of an object would be *objectively* apparent to a reasonable attacker faced with the same information?

The ICRC comments, by way of illustration, that “an airman who has received the order to machine-gun troops travelling along a road, and who finds only children going to school, must abstain from attack.”<sup>47</sup> This example suggests that an attack must be cancelled or suspended only if, as a result of new information, the actual attacker comes to *subjectively* believe that a person or object is *almost certainly* civilian rather than military.<sup>48</sup> At best, the ICRC Commentary leaves the textual ambiguities unresolved; at worst, the Commentary gives the provision an extremely narrow construction. In either case, the narrow and indeterminate scope of the provision offers little guidance in situations of significant uncertainty. To provide greater guidance to soldiers and greater protection to civilians

<sup>44</sup> Protocol I, art. 57(2)(b) (emphasis added).

<sup>45</sup> See HENCKAERTS & DOSWALD-BECK, at 60 (“Rule 19. Each party to the conflict must do everything feasible to cancel or suspend an attack if it becomes apparent that the target is not a military objective . . . .”)

<sup>46</sup> Protocol I Commentary, at 686.

<sup>47</sup> Protocol I Commentary, at 686.

<sup>48</sup> See also *id.* at 686 (“It is principally by visual means—in particular, by means of aerial observation—that an attacker will find out that an intended objective is not a military objective, or that it is an object entitled to special protection.”). Here too, the phrases “finds out”, “is not”, and “is” imply that an attack must be cancelled or suspended only if the attacker is almost certain that an object is not military or is otherwise protected. See also HPRC MANUAL COMMENTARY, at 130 (stating that an attacker must cancel or suspend an attack “when it becomes apparent *to them*” that an object is not a lawful target) (emphasis added).

we must integrate the law with a moral theory of killing in the fog of war. It is to the search for such a theory that we now turn.

## II. THE BALANCING APPROACH AND ITS LIMITS

As we have seen, in the absence of clear legal rules, the ICRC as well as leading states and scholars have adopted the Balancing Approach to target verification. According to the Balancing Approach, the level of certainty required to permissibly attack an individual varies with the balance of relevant military and humanitarian considerations. Until now, proponents of the Balancing Approach have not explained how to weigh military considerations against humanitarian considerations or how to derive the required level of certainty from the resulting balance. As one scholar observes, “[h]umanitarian considerations would require a pilot to get close to the target to identify it properly; military considerations would require the pilot to fly at a safe height to be at reduced risk from anti-aircraft fire. This is a conflict that cannot be resolved easily.”<sup>49</sup> However, this part argues that decision theory provides a method for deriving the required level of certainty from the relative costs of error.

Unfortunately, by clarifying the Balancing Approach we also expose its serious flaws. The Balancing Approach implausibly entails that soldiers may attack individuals whom they believe are probably civilians if the potential harm to soldiers even slightly outweighs the potential harm to civilians. The implausibility of this result is best explained by two moral asymmetries. The asymmetry between killing and letting die explains why it is substantially worse to kill a civilian than to allow a soldier to be killed, even though the loss of human life in each case is the same. The asymmetry between intentionally and unintentionally killing the innocent explains why it is far worse to intentionally kill an individual correctly believing her to be a civilian than to intentionally kill an individual mistakenly believing her to be a combatant, even though both the loss of human life and the causal structure of the action is the same. These two moral asymmetries doom the Balancing Approach and ground the alternative, deontological approach to targeting developed in Part III.

### A. UNCERTAINTY

Proponents of the Balancing Approach have never explained how to derive a required level of certainty from the balance of military and

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<sup>49</sup> Rogers, at 175.

humanitarian considerations. This neglect leaves the Balancing Approach imprecise and conceals its flaws. Fortunately, the entire field of decision theory is devoted to determining how to make rational decisions in the context of factual uncertainty. On most views, our primary goal when faced with uncertainty should be *error reduction*. For example, in a criminal trial, our primary purpose is to learn the truth about past events so we may convict the guilty and acquit the innocent. We seek to avoid both false convictions and false acquittals. Similarly, the primary goal of a soldier, in the context of our discussion, is to accurately distinguish between civilians and combatants so she may spare the former and kill or capture the latter. Soldiers should seek to reduce both the number of civilians they mistakenly harm and the number of opposing combatants they mistakenly spare. It follows that, before attacking an individual, soldiers should gather as much relevant information about that individual as they can without risking themselves or their mission. Soldiers should then evaluate the information they gather based on its cumulative probative weight discounted by any possible prejudicial impact.

Unfortunately, we can reduce but never completely avoid erroneous decisions. Some residual uncertainty will always remain despite our best efforts, and as a result we will inevitably make mistakes. Hence our secondary, fallback goal when faced with uncertainty should be *error distribution*. Given that we will make errors, we must determine which errors are more costly and which we should therefore try harder to avoid. Our judgment regarding the relative costs of error are reflected in a standard of certainty which, if consistently followed, will yield over time the lowest total cost of error. For example, in criminal law, our judgment that convicting an innocent defendant (a false positive or Type I error) is much worse than acquitting a guilty defendant (a false negative or Type II error) is reflected in the standard of proof beyond a reasonable doubt, which yields over time far fewer false convictions than false acquittals. Similarly, the level of certainty a soldier must achieve before killing an individual should reflect a moral judgment regarding the relative moral weight of killing a civilian and allowing oneself, one's fellow soldiers, or other civilians to be killed.

In principle, one can calculate the level of certainty required to make a rational decision based on the relative costs of false positives and false negatives.<sup>50</sup> Specifically, the probability  $P$  of a claim  $C$  given the

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<sup>50</sup> See, e.g., ALEX STEIN, FOUNDATIONS OF EVIDENCE LAW 15-16 (2005). See also *id.* at 149 (using a different formula to fix the required level of certainty, according to which the odds that a claim is true, given the evidence, must be greater than the ratio of the costs of a false positive to the costs of a false negative:  $O(C|E) >$

evidence E must be greater than the following function of the costs of a false positive (D+) and a false negative (D-):

$$P(C|E) > 1/(1 + \frac{(D-)}{(D+)})$$

Given plausible assumptions, this function can yield plausible results. For example, if convicting an innocent defendant of a crime generally is ten times worse than acquitting a guilty defendant of a crime, then the level of certainty required for criminal conviction will be very high:

$$P(C|E) > 1/(1 + \frac{1}{10}) = 1/1.1 = .91$$

Presumably, greater-than-91% certainty is a fair approximation of the criminal law standard of proof beyond a reasonable doubt. By contrast, if a false judgment for a tort plaintiff is neither better nor worse than a false judgment for a tort defendant then the level of certainty required to find for the plaintiff will be just barely higher than the level of certainty required to find for the defendant:

$$P(C|E) > 1/(1 + \frac{1}{1}) = 1/2 = .50$$

Presumably, greater-than-50% certainty is a fair approximation of the private law standard of proof by a preponderance of the evidence.

Before using this formula to clarify the Balancing Approach, it is worth pausing to consider the formula's moral foundations. One account, offered by many decision theorists, is that decision-makers should adopt decision rules that will minimize the total cost of the errors they will make over the long term. The total cost of error, in turn, depends on the relative costs of the different errors one might make. In order to minimize the total cost of error, decision-makers should adopt a decision rule that will lead them to make more less-costly errors and fewer more-costly errors. The standard of certainty is a mechanism for skewing decisions in favor of less-

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(D+)/D(-)). Larry Laudan and Harry Saunders have impressively argued that, on a conceptual level, the standard of certainty should also reflect the value of true positives and true negatives. *See, e.g.,* Larry Laudan & Harry Saunders, *Re-Thinking the Criminal Standard of Proof: Seeking Consensus about the Utilities of Trial Outcomes*, XX \_\_\_\_ XX (20XX). However, in the context of armed conflict, true negatives do not appear to have significant benefits other than avoiding the costs of false positives, and true positives do not appear to have significant benefits other than avoiding the costs of false negatives. Consideration of true positives and true negatives should not affect the required standard of certainty. I will therefore use the more conventional and widely-accepted formula for calculating the required standard of certainty.

costly errors. In other words, since we can reduce but never eliminate the risk of error, we should distribute any residual risk of error so as to minimize the total cost of error.

All of this may sound uncomfortably consequentialist, but it need not. We could just as easily say that our primary goal is to avoid committing serious moral wrongs; that, given factual uncertainty, we will unavoidably fail and end up committing some such wrongs; that the best we can do is try to reduce the overall seriousness of the wrongs we commit; and that we must therefore act in the face of uncertainty in a way that reflects the relative seriousness of different wrongs. For example, it is wrong to convict the innocent and wrong to acquit the guilty. Unfortunately, we can reduce but not eliminate the risk of mistakenly committing one wrong or the other. Since the former is a much more serious wrong than the latter, we should convict only with a level of certainty that will lead us to inadvertently commit the more serious wrong (false conviction) much less often than the less serious wrong (false acquittal). We will thereby reduce the overall seriousness of the wrongs we inadvertently commit.

#### B. THE BALANCING APPROACH REVISITED

We now can see how decision theory can enhance the determinacy of the Balancing Approach. In the context of target verification, soldiers may err in two ways: by mistakenly identifying a civilian as a combatant and then killing her (a false positive), or by mistakenly identifying a combatant as a civilian and then sparing her (a false negative). False positives carry obvious costs to civilians while false negatives carry significant costs to the attacking force. According to decision theory, the level of certainty a soldier must possess that an individual is a combatant and not a civilian before using deadly force can be represented as a function of the relative costs of a false positive and a false negative. Importantly, the relative costs of error to civilians and to the attacking force will vary from case to case, so the required level of certainty will vary as well. In other words, the required level of certainty varies with the balance of military and humanitarian considerations, just as the Balancing Approach proposes.

To simplify the following discussion, let us assume that the cost of a false positive is that you will kill a civilian and the cost of a false negative is that you will spare a combatant who may go on to kill one or more of your fellow soldiers. This is no more than a simplifying assumption, subject to three important qualifications.

First, the costs of both killing civilians and (particularly) sparing combatants vary from case to case. On one hand, while every false positive involves the death of a civilian, not every false negative results in the death of a fellow soldier. Not every opposing combatant makes a necessary contribution to lethal operations such that killing her will prevent even one fellow soldier from being killed, and mistakenly spared combatants will often be killed in future engagements before they can kill even one fellow soldier.<sup>51</sup> In addition, according to contemporary counterinsurgency theory, killing an insurgent may have little strategic benefits since her death may inspire others to take up arms, while killing a civilian may have strategic costs by turning the civilian population against one's forces.<sup>52</sup> On the other hand, the death of a combatant not only eliminates the threat she poses but also may (perhaps temporarily) deplete the opposing force. In some cases, a combatant who is mistakenly spared at one time may become more dangerous or more difficult to kill or capture later. In addition, the deaths of soldiers at the hands of mistakenly spared combatants may place other soldiers at greater risk or jeopardize the success of a mission or, over time, the success of the war effort. It seems to me that these variables offset one another to a sufficient degree that it is unlikely that their net weight would significantly change the conclusions of this part.

Second, often a soldier who kills a suspected combatant will also unintentionally but knowingly kill one or more civilians as a side-effect of her attack. In such cases, the soldier must not only reach the required level of certainty that the targeted individual is a combatant but also ensure that the *expected* military advantage of killing that individual (that is, the value of killing her if she is a combatant, discounted by the likelihood that she is a combatant) substantially outweighs the unintended loss of civilian life.<sup>53</sup>

Finally, the costs of error will themselves be uncertain, so strictly speaking we should compare the average expected costs of error, that is, the average of the possible costs of an erroneous decision discounted by their respective probabilities. Nevertheless, for the sake of simplicity we will assume that the average expected costs of error are that either a soldier will kill a civilian or that a spared combatant may kill one or more soldiers.

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<sup>51</sup> In criminal law, we can sometimes correct false convictions but can never correct false acquittals. In armed conflict, the opposite is the case; there are no appeals, but there is double jeopardy.

<sup>52</sup> See, e.g., DAVID PETRAEUS, U.S. DEP'T OF DEF., *THE U.S. ARMY AND MARINE CORPS COUNTERINSURGENCY FIELD MANUAL* (U.S. Army Field Manual No. 3-24, 2006).

<sup>53</sup> See Haque, *Proportionality (in War)*.



We should start from the assumption that the death of a civilian and the death of a soldier are equally bad outcomes. Civilians and soldiers are, after all, human beings. Accordingly, it would seem that even if the cost of a false negative is the death of only one soldier the required level of certainty would be fairly low:

$$P(C|E) > 1/(1 + \frac{1}{1}) = 1/2 = .50$$

In other words, it seems that on the Balancing Approach it is permissible to kill an individual whom you believe is only slightly more likely a combatant than a civilian in order to prevent one soldier from being killed if the individual turns out to be a combatant. Moreover, it seems that if the cost of a false negative is the death of two fellow soldiers then the required level of certainty is even lower:

$$P(C|E) > 1/(1 + \frac{2}{1}) = 1/3 = .33$$

In other words, according to the Balancing Approach, it is permissible for a soldier to intentionally kill an individual whom the soldier is reasonably certain is a civilian (indeed, whom the soldier reasonably estimates is twice as likely a civilian than a combatant) in order to prevent two soldiers from being killed if the individual turns out to be a combatant. Put another way, a soldier may take a 66% chance of killing a civilian to avoid a 33% chance of allowing two soldiers to be killed. These results seem implausible. Why?

### C. LIMITS: KILLING AND LETTING DIE

The fact that soldiers and civilians are human beings whose lives are equal in value does not entail that their deaths should count equally in determining the relative costs of error. We must also consider *how* their deaths come about—how their deaths are causally related to our conduct.<sup>54</sup> Specifically, there is a moral asymmetry between killing a human being and letting a human being die.<sup>55</sup> This moral asymmetry manifests itself is

<sup>54</sup> The idea that the permissibility of our actions depends not only on their consequences but also on their causal structure is an essential part of any nonconsequentialist moral theory. See, e.g., F.M. Kamm, *Towards the Essence of Nonconsequentialist Constraints*, in *FACT AND VALUE* (A. Byrne, et al. eds., 2001).

<sup>55</sup> As Jeff McMahan observes, “[v]irtually all of us, even consequentialists, act on the presupposition that the constraint against harmful killing is in general stronger than the constraint against harmfully allowing someone to die, when all other relevant factors, such as intention, are the same in both cases.” Jeff McMahan, *The*

several important ways. Most importantly, it is not morally permissible to kill one innocent person either as means or as a side-effect of preventing another innocent person from being killed.<sup>56</sup> It is not permissible to intentionally kill one person as a means of preventing several others from being killed (say, by using the healthy organs of one person to replace the damaged organs of several others). Nor is it permissible to unintentionally kill one person as a side-effect of preventing one other person from being killed (say, by throwing a grenade at an attacker surrounded by innocent bystanders). Forced to choose between killing one innocent person and allowing another innocent person to die we must choose the latter.

In contrast, absent special obligations, generally it is permissible to allow an innocent person to die as a means or as a side-effect of preventing several others from being killed. For example, generally it is permissible to use limited medication to save several people even if, as a side-effect, one other person will die without that medication. In addition, if removing one person from danger will expose several others to the same danger then generally it is permissible to allow the one person to die as a means of protecting the several. Finally, generally it is impermissible to kill an innocent person to avoid serious harm to yourself, but generally it is permissible to allow an innocent person to die if rescuing her from danger would involve serious harm to yourself. Each of the asymmetric outcomes described above are rooted in the general moral asymmetry between killing and letting die. We can refer to this asymmetry by saying that killing is morally *worse*, or *harder to justify*, than letting die.<sup>57</sup>

If killing generally is worse than letting die, then, even if the lives of civilians and the lives of soldiers have equal moral value, generally it is

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*Just Distribution of Harm Between Combatants and Noncombatants*, 38  
PHILOSOPHY & PUBLIC AFFAIRS 342, 369 (2010).

<sup>56</sup> See also *id.* (“This moral asymmetry between killing and letting die provides, among other things, part of the explanation of why it is impermissible to kill an innocent bystander as a means of preserving one’s own life, and perhaps the full explanation of why it is impermissible to kill an innocent bystander as a side effect of defending or preserving one’s own life.”)

<sup>57</sup> Significantly, in some cases *unjustifiable* killing and *unjustifiable* letting die may be equally morally blameworthy. See, e.g., James Rachels, *Active and Passive Euthanasia*, 292 NEW ENG. J. MED. 78 (1975) (comparing the drowning of a child to inherit a large fortune with allowing a child to drown for the same reason). However, the preceding discussion shows that killing is *harder to justify* than letting die, and is *worse* in that sense.

worse to kill a civilian than to allow a soldier to be killed.<sup>58</sup> If you are deciding whether to kill an individual who might be a civilian or possibly allow a fellow soldier to be killed, then generally you should err in favor of the latter, generally lesser wrong. More precisely, if killing a civilian is substantially worse than allowing a soldier to be killed, you may not kill an individual unless she is at least *equally substantially* more likely (or *proportionately* more likely) a combatant than a civilian. For example, if killing a civilian is twice as bad as allowing a soldier to be killed, then you may not kill an individual unless she is at least twice as likely a combatant rather than a civilian (67% versus 33%); if three times as bad then three times as likely (75% versus 25%); and so on.

One might think that the moral asymmetry between killing and letting die is offset by the moral obligations of soldiers to protect one another. Such associative obligations may be very strong. Many soldiers feel obligated to risk their own lives to defend their fellow soldiers from attack, to carry those who are wounded, and to rescue those who are captured. However, there are at least three reasons why such associative obligations do not substantially offset the moral asymmetry between killing civilians and allowing soldiers to be killed.

First, generally it is not permissible to shift risks from one person onto another person who has not voluntarily assumed those risks; in such cases, the risks must lie where they fall.<sup>59</sup> If those at risk have voluntarily assumed those risks then it is even harder to justify shifting those risks onto others who have not voluntarily assumed those risks. Since soldiers generally assume the risks of combat voluntarily while civilians generally do not, it is even harder for soldiers to justify shifting risks from themselves onto civilians. Of course, many soldiers are conscripted or join

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<sup>58</sup> Does the asymmetry between killing and letting die also entail that it is worse to kill an opposing combatant than to allow a soldier to be killed, since combatants are also human beings whose lives have equal moral value? No. It is generally permissible to kill a lethal attacker in self-defense or defense of others. Soldiers fighting for a just cause have a moral right to kill opposing combatants to defend themselves and their fellow soldiers from lethal attack. For further discussion see Adil Ahmad Haque, *Criminal Law and Morality at War*, in PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 481 (R.A. Duff & Stuart P. Green eds., 2011).

<sup>59</sup> See Haque, *Proportionality (in War)*. In some cases, it may be permissible to redirect a pre-existing threat from several people to one person. See, e.g., Judith Jarvis Thompson, *The Trolley Problem*, 94 Yale L.J. 94 1395 (1985). But generally it is impermissible to redirect a pre-existing threat from one person to one other person. Certainly, generally it is not permissible to create a new risk of harm to one person in order to avert a pre-existing risk of harm to another person.

the military to escape poverty. However, generally it is not permissible to kill innocent people to avoid punishment or escape poverty.

Second, the notion that associative obligations can help justify killing civilians is itself highly dubious. As McMahan observes, “a third party acting to defend another person may in general cause no more harm to innocent bystanders than the person he is defending would be permitted to cause by acting in self-defense. And most people agree that it is not permissible for a person to defend her own life if in doing so she would unavoidably kill an innocent bystander as a side effect.”<sup>60</sup> Similarly, Walzer observes that an officer “cannot save [the soldiers under her command], because they cannot save themselves, by killing innocent people.”<sup>61</sup>

Finally, it is both morally and legally impermissible to *indirectly* cause the death of a civilian either as a means of saving oneself or another soldier (for example, by using a civilian as a human shield) or as a side-effect of saving oneself or another soldier (for example, by hiding among civilians). It could hardly be permissible to *directly* cause the death of a civilian in order to save oneself or another soldier.

The preceding discussion also explains why it remains worse for a soldier to kill a civilian than to allow another civilian to be killed, even if the soldier has a stronger moral obligation to protect some civilians than to protect other civilians.<sup>62</sup> If generally it is impermissible to shift risks from

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<sup>60</sup> McMahan, at 376-77. Again, it would not be permissible to throw a grenade at a lethal attacker surrounded by innocent bystanders.

<sup>61</sup> Walzer, at 155.

<sup>62</sup> Asa Kasher and Amos Yadlin argue that soldiers have a stronger duty to minimize harm to fellow citizens than to minimize harm to foreign civilians and conclude that soldiers are morally permitted to minimize harm to fellow citizens by killing foreign civilians. See Asa Kasher and Amos Yadlin, *Military Ethics of Fighting Terror: An Israeli Perspective*, 4 JOURNAL OF MILITARY ETHICS 3, 14-15, 18-21 (2005). I will not discuss their argument at length because the intermediate premises of their argument are highly implausible. For example, they assert that “[i]t is as morally wrong for the state to let its citizens die [when killing foreign civilians would prevent their deaths] as it is morally wrong to kill them.” *Id.* at 20. However, it seems clear that it is much worse for a state to kill its citizens than to allow its citizens to be killed, holding the state’s reasons (say, to avoid killing foreign civilians) constant. Certainly it is much worse for a state to kill its citizens for *no* reason than to allow its citizens to be killed to avoid killing foreign civilians. I will therefore only discuss the less implausible claim that a soldier’s duty to protect certain civilians offsets the moral asymmetry between killing foreign

one group of innocent people to another, then it is impermissible to shift risks from one group of civilians to another. Moreover, a soldier has no right to inflict greater harm to protect any civilians than those civilians have a right to inflict to protect themselves. Since it is impermissible for one civilian to kill another civilian as a means or as a side-effect of saving her own life, it is also impermissible for a soldier to kill one civilian as a means or as a side-effect of saving another civilian.<sup>63</sup> Finally, since it is impermissible to protect any civilians by indirectly causing the death of other civilians (by using the other civilians as human shields or by hiding among them) it cannot be permissible to protect any civilians by directly causing the death of other civilians. It follows that whether mistakenly sparing a combatant will result in the death of soldiers or the death of civilians the required level of certainty must always reflect the moral asymmetry between killing and letting die.

#### D. LIMITS: INTENTIONAL AND UNINTENTIONAL KILLING

Would a Modified Balancing Approach, that incorporates the distinction between killing and letting die, provide a moral basis for targeting in armed conflict? For the sake of convenience, let us assume that mistakenly killing a civilian is twice as bad as mistakenly allowing a soldier to die. If a mistakenly spared combatant would kill one soldier, then soldiers must be moderately certain that an individual is a combatant before attacking her:

$$P(C|E) > 1/(1 + \frac{1}{2}) = 1/1.5 = .67$$

To some, 67% certainty that an individual is a combatant may sound like a reasonable level of certainty to require of soldiers.

However, even on the Modified Balancing Approach, the more soldiers you might save by killing a combatant the less sure you have to be that an individual is a combatant rather than a civilian in the first place. For example, if a mistakenly spared combatant would kill 20 soldiers, then soldiers may attack an individual who is almost certainly a civilian and not a combatant:

$$P(C|E) > 1/(1 + \frac{20}{2}) = 1/11 = .09$$

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civilians and allowing fellow citizens to be killed. For a more comprehensive refutation of Kasher and Yadlin's arguments see McMahan at 346-50.

<sup>63</sup> See Haque, *Proportionality (in War)*.

So, according to even a Modified Balancing Approach, it is permissible to kill an individual whom one is 90% sure is a *civilian* if there is a 10% chance that she is a combatant and that by killing her you will save 20 soldiers. Yet this result seems completely implausible. Why?

If you are almost certain that someone is a civilian then you presumably *believe* that she is a civilian; and if you intentionally kill an individual who is in fact a civilian, believing her to be a civilian, then you *intentionally* kill a civilian. Needless to say, intentionally killing a civilian is the most serious violation of LOAC/IHL, just as intentionally killing a human being who has done nothing to deserve or make herself liable to be killed is the most serious of moral wrongs. This wrong is never justifiable, except perhaps in the most extreme circumstances to prevent far greater harm to others.<sup>64</sup> Certainly, it is not morally justifiable to intentionally kill a civilian for a 10% chance of saving 20 soldiers.<sup>65</sup>

Now, we earlier assumed, based on the moral asymmetry between killing and letting die, that mistakenly killing a civilian is twice as bad as mistakenly sparing a combatant and thereby allowing a fellow soldier to be killed. But we have now introduced a second, stronger moral asymmetry, between intentionally killing civilians and unintentionally killing civilians. In other words, we earlier assumed that mistakenly killing a civilian is equivalent to unintentionally killing a civilian. But this need not be the case. If you intentionally kill someone whom you reasonably but mistakenly believe is a combatant, then you have unintentionally killed a civilian. And unintentionally killing a civilian is substantially worse, but not far worse, than allowing a soldier to be killed. By contrast, if you intentionally kill someone whom you believe is a civilian, then you have intentionally killed a civilian. And intentionally killing a civilian is far worse than allowing a soldier to be killed.

We can put the point a different way: We have been following the assumption of the Balancing Approach that the required level of certainty is a function of the relative costs of error. But we now see that the relative

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<sup>64</sup> Walzer famously holds that attacks on civilian populations could only be justifiable to prevent a “supreme emergency” involving the destruction of an entire political community. See WALZER, ch. 16. Presumably, it follows that attacks on individual civilians are justifiable only to prevent far greater harm to others.

<sup>65</sup> Indeed, it is probably impermissible to intentionally kill a civilian to *certainly* save 20 soldiers. See, e.g., Heidi M. Hurd, *The Deontology of Negligence*, 76 B.U. L. REV. 249, 253 (1996) (observing that “if the norms of morality prohibit the action of killing an innocent person, one may not kill an innocent person even if doing so would prevent twenty innocent people from being killed.”)

*moral* costs of error are themselves a function of an actor's *subjective* level of certainty. A soldier's subjective level of certainty that an individual is a combatant or a civilian affects whether or not, in the event of a false positive, she intentionally kills a civilian or unintentionally kills a civilian. As we have seen, the moral cost of a false positive will be far greater if the soldier intentionally kills a civilian than if she unintentionally kills a civilian. Crucially, this difference in the moral cost of a false positive will, in turn, affect the level of certainty required to permissibly open fire. The asymmetry between intentionally and unintentionally killing civilians, as well as the effect of this asymmetry on the required level of certainty, will be discussed in greater depth in the following part.

### III. DEONTOLOGICAL TARGETING

This part develops a normative theory of target verification based on the very moral asymmetries that the Balancing Approach ignores. This normative theory, which I call 'Deontological Targeting', is developed in three stages. Section A argues that it is impermissible for a soldier to intentionally kill an individual whom she believes is a civilian or whom she believes is probably a civilian. Section B goes further, arguing that it is unjustifiable and inexcusable for a soldier to intentionally kill an individual whom she does not reasonably believe is a combatant. Reasonable belief that an individual is a combatant constitutes a minimum threshold of certainty that soldiers must reach to permissibly use deadly force. Finally, Section C argues that, due to the moral asymmetry between killing and letting die, a soldier may not intentionally kill an individual unless she is *reasonably convinced* that the individual is a combatant; is *reasonably certain* that the individual poses an immediate threat to a soldier or civilian; or *reasonably believes* that the individual poses an immediate threat to a substantial number of soldiers or civilians. Section D compares Deontological Targeting with an alternative view proposed by Lt. Col. Geoffrey Corn.

#### A. THE INTENTION-BELIEF CONSTRAINT

In the previous part I claimed that the moral and legal constraint on intentionally killing a civilian is violated when one intentionally kills an individual, believing her to be a civilian, and she is in fact a civilian. Importantly, to kill a civilian intentionally one need not kill the civilian because she is a civilian; it is enough that one believes that she is a

civilian.<sup>66</sup> This understanding of intentional killing is supported by general principles of criminal law. As Glanville Williams puts it, “[i]ntention is a state of mind consisting of knowledge of any requisite circumstances plus desire that any requisite result shall follow from one’s conduct . . . .”<sup>67</sup> In the current context, the requisite result that must be desired is the death of the individual attacked, while the requisite circumstance the existence of which must be known is the fact that the individual attacked is a civilian. Similarly, the Model Penal Code states that “[a] person acts purposely with respect to a material element of an offense when . . . if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.”<sup>68</sup> Michael Moore puts the point even more strongly: “The one simple truth is that the law nowhere requires true purpose with regard to such circumstances.”<sup>69</sup> The same is true in international criminal law.<sup>70</sup> On all of these accounts, to intentionally kill a civilian is to intentionally kill an individual whom one correctly believes is a civilian.

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<sup>66</sup> Obviously, some terrorist groups intentionally kill civilians because they are civilians; others intentionally kill civilians simply because they are vulnerable to attack and their deaths will spread terror. Similarly, soldiers carrying out a campaign of genocide may intend to kill individuals because of their race, religion, ethnicity, or nationality, irrespective of whether they are civilians or opposing soldiers. Nevertheless, if terrorists or *genocidaires* intentionally kill individuals correctly believing them to be civilians then, for both moral and legal purposes, they intentionally kill those civilians.

<sup>67</sup> GLANVILLE WILLIAMS, *THE MENTAL ELEMENT IN CRIME* 20 (1965).

<sup>68</sup> Model Penal Code § 2.02(a). *See also* Model Penal Code § 2.02 commentary at 223 (“Knowledge that the requisite external circumstances exist is a common element in both [purpose and knowledge].”).

<sup>69</sup> Michael S. Moore, *Intention as a Marker of Moral Culpability and Legal Punishability*, in *PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW* 179, 187 (R.A. Duff and Stuart P. Green eds., 2011). *See also id.* (“This is certainly true of general intent crimes such as rape: the actor need only know that the woman is not consenting, he need not be motivated by that fact (wanting only forced sex, for example). But this is even true of specific intent crimes such as assault with intent to rape.”).

<sup>70</sup> *See, e.g.,* Mohamed Elewa Badar, *The Mental Element in the Rome Statute of the International Criminal Court: A Commentary from a Comparative Criminal Law Perspective*, 19 *CRIMINAL LAW FORUM* 473, 496 (2008) (“Logically speaking, there is no offence which requires the prosecution to prove that the accused, in the true sense, intends a particular circumstance to exist at the time he carries out his conduct.”)



The structure of intentional killing provides moral and legal support for A.P.V. Rogers's otherwise undefended assertion that "[a]t the very least, customary law would require those responsible for attacks not to attack persons or objects which they know or believe to be civilian."<sup>71</sup> Customary law clearly prohibits intentionally attacking civilians, and intentionally attacking civilians just is intentionally attacking individuals whom one knows or believes are civilians.

The prohibition on intentionally killing individuals whom one believes are civilians provides an outer limit to the Balancing Approach: one may not kill an individual whom one believes is a civilian even if there is some chance that she is a combatant and that sparing her will result in harm to one's forces or mission. However, this outer limit remains far too weak: the prohibition would not apply to a soldier who 'shoots first and asks questions later' by attacking an individual without forming either a belief that she is a civilian or a belief that she is a combatant. Such a soldier necessarily violates her legal obligation to distinguish civilians from combatants. At a minimum, distinguishing civilians from combatants requires deciding, judging, determining, or concluding who is a civilian and who is a combatant. In addition, soldiers are legally required to exercise 'constant care' to spare civilians<sup>72</sup> and are morally required both *not to try* to kill civilians and to *try not* to kill civilians.<sup>73</sup> At a minimum, constant care to spare civilians and trying not to kill civilians requires deciding who is a civilian and who is a combatant. In ordinary life you are often morally permitted to withhold judgment in the face of uncertainty. But if the question is whether the individual you intend to kill is a civilian or a combatant, you are not allowed to keep an open mind.

What moral and legal concepts best capture the culpability of the soldier who intentionally kills an individual without forming any affirmative belief regarding that individual's liability to be killed? It is tempting to say that such a soldier acts *recklessly* with respect to whether the individual attacked is a civilian or a combatant. However, the concept of recklessness will not advance our understanding. Recklessness generally involves the unjustified creation of a substantial risk; to find an actor reckless we must compare the risk she creates with her reasons for taking that risk. In the current context, a finding of recklessness would involve comparing the risk of mistakenly killing a civilian with the risk of

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<sup>71</sup> Rogers, at 176.

<sup>72</sup> *Id.*

<sup>73</sup> See WALZER, *supra* note 80, at 155-56 (proposing a principle of "double intention").

mistakenly sparing a combatant. In other words, a recklessness inquiry would lead us back to the Balancing Approach we have already rejected. Even a recklessness inquiry that reflects the moral asymmetry between killing and letting die would still entail that it is permissible to intentionally kill an individual who is almost certainly a civilian if doing so might (but almost certainly will not) prevent a substantially greater (but not far greater) number of soldiers from being killed. If that implication still seems implausible then the concept of recklessness cannot lead us forward.

Alternatively, we could regard the soldier who attacks individuals without forming any belief regarding their legal status as morally equivalent to a soldier who attacks individuals believing that they are civilians. This approach finds some support in modern criminal law. According to the Model Penal Code, “when knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.”<sup>74</sup> The drafters of the Model Penal Code believed that their understanding of knowledge “‘deals with the situation that British commentators have denominated ‘wilful blindness’ or ‘connivance,’ the case of the actor who is aware of the probable existence of a material fact but does not determine whether it exists or does not exist.”<sup>75</sup> Following this approach, we would regard a soldier who is aware of a high probability that an individual is a civilian, and who does not affirmatively believe that the individual is a combatant, as morally equivalent to a soldier who affirmatively believes that the individual is a civilian. If the willfully blind soldier intentionally kills an individual, and the individual is in fact a civilian, then the willfully blind soldier is regarded as having intentionally killed a civilian.

Taken to an extreme, the asserted moral equivalence of willful blindness and affirmative belief can erode the distinction between knowledge and recklessness. If you believe that there is a low probability that a fact exists, but form no affirmative belief one way or the other, then it seems unfair to regard you as if you affirmatively believe that fact exists. However, if we take the requirement of a ‘high probability’ seriously, the asserted moral equivalence seems sound. Specifically, a belief that a fact *probably*, or *more likely than not*, exists, absent an affirmative belief that the fact does not exist, seems morally equivalent to an affirmative belief that the fact exists. At first glance, when an individual withholds judgment

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<sup>74</sup> Model Penal Code § 2.02(7).

<sup>75</sup> Model Penal Code § 2.02 commentary at 248.

regarding a particular fact, we may feel that she could just as easily conclude that the fact does exist or that the fact does not exist. If her culpability would be significantly less if she were to conclude that the fact does not exist (in which case she might be reckless regarding that fact but would not know that the fact exists), then we may feel that we ought to give her the benefit of the doubt and treat her as if she had the lower level of culpability. We essentially give her moral credit for the less culpable mental state that she could have formed but did not. But this grant of moral credit would be inappropriate if she estimates that the fact probably does exist, because in that case it would be *irrational* for her to conclude that it does not exist. It would be irrational for her to think “*A* is probably *x*, but *A* is not *x*.” Specifically, it would be irrational to estimate that someone is probably, or more likely than not, a civilian but nevertheless form an affirmative belief that she is a combatant. Withholding judgment should not mitigate one’s blameworthiness when one is rationally restrained from forming the less culpable judgment. In such cases, withholding judgment is morally comparable to forming the more culpable judgment, which is the only judgment one could rationally form.

We have therefore identified two plausible constraints on the Balancing Approach: a soldier may not intentionally kill an individual whom the soldier either (i) believes is a civilian or (ii) believes is probably a civilian and does not affirmatively believe is a combatant. However, these constraints remain too subjective and too weak: they permit soldiers to intentionally kill individuals whom they unreasonably believe are probably combatants, or whose probable status they have not even bothered to estimate. The following section proposes a stronger, objective threshold of certainty that soldiers must achieve before using lethal force.

#### B. THE REASONABLE BELIEF THRESHOLD

In the preceding section we saw that soldiers may not intentionally kill individuals whom they *subjectively believe* are or probably are *civilians*. The goal of this section is to show that soldiers may not intentionally kill individuals unless the soldiers *reasonably believe* those individuals are *combatants*.

The reasonable belief threshold already has some basis in state practice and international court judgments. For example, the US Naval Handbook states that “[c]ombatants in the field must make an honest determination as to whether a particular civilian is or is not subject to deliberate attack based on the person’s behavior, location and attire, and

other information available at the time.”<sup>76</sup> In other words, soldiers may not intentionally kill individuals unless they *sincerely* believe those individuals are combatants. This principle precludes soldiers from attacking without first forming an affirmative belief that an individual is a combatant. Unfortunately, the ‘honest determination’ standard permits a soldier to attack based on an unreasonable belief that an individual is a combatant. This standard is an improvement over the standards discussed in the previous section, but is also too subjective.

The correct position was elegantly expressed by the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) when it wrote that “a person shall not be made the object of attack when it is not reasonable to believe, in the circumstances of the person contemplating the attack, including the information available to the latter, that the potential target is a combatant.”<sup>77</sup> This principle precludes soldiers from attacking unless they both sincerely and reasonably believe that the individual attacked is a combatant. Unfortunately, the Trial Chamber did not explain the moral or legal basis for its statement and its actual holding was more limited.<sup>78</sup> Indeed, it appears that the Trial Chamber’s statement has been almost entirely ignored by courts, commentators, and scholars.<sup>79</sup> The argument of this section provides moral support for the Trial Chamber’s legal claim.

At the most fundamental moral level, what makes the intentional killing of a civilian presumptively morally wrong is not that she is a civilian but that she is a human being. The fact that an individual is a civilian does not give her any more rights or additional moral protection

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<sup>76</sup> United States, Naval Handbook § 830.

<sup>77</sup> Prosecutor v. Stanislav Galić, Case No. IT-98-29-T, Judgment of Trial Chamber (Int’l Crim. Trib. for the Former Yugoslavia, Dec. 5, 2003), available at <http://www.icty.org/x/cases/galic/tjug/en/gal-tj031205e.pdf>.

<sup>78</sup> The Trial Chamber held that it is a war crime to recklessly attack civilians. *See id.* para. 54. However, as we have seen in the previous section, a recklessness threshold replicates the very Balancing Approach we earlier rejected.

<sup>79</sup> Searches of Westlaw and Google indicate that the Trial Chamber’s statement has never been cited by another judge or examined by a single scholar, and has been quoted (without discussion) in only two sources. *See* JENNIFER TRAHAN (HUMAN RIGHTS WATCH), GENOCIDE, WAR CRIMES, CRIMES AGAINST HUMANITY 125 (2006); ICRC, Customary IHL Database, [http://www.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule1\\_SectionC](http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule1_SectionC); *id.* at [http://www.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule6](http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule6); *id.* at [http://www.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule6\\_sectiond](http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule6_sectiond).

than she would otherwise enjoy simply in virtue of being human.<sup>80</sup> Indeed, the crime of murder just is the intentional killing of another human being. It follows that, from a moral perspective, it is the intentional killing of another human being that a soldier needs to be able to either justify or excuse.

What might justify a soldier in intentionally killing another human being? Among other things, the fact that a human being is a combatant might justify intentionally killing her, because by becoming a combatant she may forfeit her moral right not to be intentionally killed and make herself morally liable to be intentionally killed.<sup>81</sup> So international law, and much of just war theory, has it exactly wrong: the fact that someone is a civilian is not a wrong-making feature of intentionally killing her; the fact that she is a human being is sufficient to make it presumptively wrong to intentionally kill her. Instead, the fact that someone is a combatant is a wrong-justifying feature of intentionally killing her; by becoming a combatant she makes herself liable to be killed.<sup>82</sup> It follows that it is not only unjustifiable to intentionally kill an individual whom you honestly (and correctly) believe is a *civilian*; it is also unjustifiable to intentionally kill an individual whom you do not reasonably (and correctly) believe is a *combatant*.

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<sup>80</sup> Cf. WALZER, 145 (“[T]he theoretical problem is not to describe how immunity [to intentional killing] is gained, but how it is lost. We are all immune to start with; our right not to be attacked is a feature of normal human relationships.”)

<sup>81</sup> The moral basis of liability to intentional killing in armed conflict remains the subject of profound philosophical disagreement. See, e.g., WALZER (arguing that all combatants are liable to be killed because they pose a threat to opposing combatants and civilians); JEFF MCMAHAN, *KILLING IN WAR* (2009) (arguing that only combatants who fight for an unjust cause are liable to be killed because they are responsible for an unjust threat to opposing combatants and civilians; in principle, civilians and prisoners who share responsibility for an unjust threat are also liable to be killed). For my own view see Haque, *Criminal Law and Morality at War*, at 495-96 (arguing that combatants fighting for a just cause may defend themselves from opposing combatants who forcibly resist their achievement of their just cause; civilians and prisoners are never liable to be killed). However, our topic is sufficiently narrow to avoid most points of controversy. We are designing rules for soldiers who presumably believe that they fight for a just cause and who must decide whether to intentionally kill an individual who may pose or decisively contribute to a lethal threat to them or their fellow soldiers. The proposed rules will remain sound on any plausible account of the moral basis of liability to intentional killing in armed conflict.

<sup>82</sup> For further discussion see Haque, *Criminal Law and Morality at War*.

But what if you intentionally kill a human being whom, it turns out, is not a combatant but instead a civilian who retains her ordinary right not to be intentionally killed? You are not justified in killing her because she is not in fact a combatant. However, you may be excused in killing her if you reasonably believe that she is a combatant. If you reasonably but mistakenly believe that a justifying circumstance exists then your belief does not justify your action but generally it will excuse your action. Indeed, “the paradigm excuse is that one had a justified belief in justification.”<sup>83</sup> Your reasonable mistake does not make what you did morally desirable, but generally it does render you moral blameless. So, if you intentionally kill another human being then you have committed a presumptive moral wrong that you must either justify or excuse. If you act on the true belief that she is a combatant, then you may be justified; if you act on the reasonable but mistaken belief that she is a combatant, then you may be excused. Alternatively, we can say that action based on a reasonable belief in a justifying circumstance is permissible relative to the evidence even if it proves impermissible relative to the facts.<sup>84</sup>

What, then, is a reasonable belief? In general, a reasonable belief is a justified belief; a justified belief is a belief supported by *undefeated* reasons; and reasons are undefeated if they are at least as strong as any opposing reasons.<sup>85</sup> It follows that a belief that a justifying circumstance exists is reasonable just in case the reasons to believe that circumstance exists are at least as strong as the reasons to believe that circumstance does

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<sup>83</sup> John Gardner & Timothy Macklem, *Reasons*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 444 (Jules Coleman & Scott Shapiro eds. 2000) (“The contrast here is between having reasons for action and having reasons to believe that one has reasons for action. It corresponds to the distinction, well known to all lawyers, between justifications and excuses. One justifies one’s actions by reference to the reasons one had for acting. One’s actions are excused in terms of the reasons one had for believing that one had reasons for action.”).

<sup>84</sup> See DEREK PARFIT, 1 ON WHAT MATTERS 150-51 (2011) (“Some act of ours would be *wrong* in the *fact-relative* sense just when this act would be wrong in the ordinary sense if we knew all the relevant facts, . . . and *wrong* in the *evidence-relative* sense just when this act would be wrong in the ordinary sense if we believed what the available evidence gives us decisive reasons to believe, and these beliefs were true.”).

<sup>85</sup> See, e.g., JOHN GARDNER, OFFENCES AND DEFENCES 110 (2007) (“One must have an undefeated reason for one’s belief, and that moreover must be the reason why one holds the belief.”)

not exist.<sup>86</sup> Conversely, a belief that a justifying circumstance exists is unreasonable if the reasons to believe that circumstance exists are outweighed by the reasons to believe that circumstance does not exist. We can express the same idea by saying that it is unreasonable to believe that a justifying circumstance exists if you have reason to believe that the circumstance *probably* does not exist, or if you have *most* or *strongest* reasons to believe that the circumstance does not exist. We can also see why generally we excuse actions based on reasonable but mistaken beliefs: although the actions are unjustified, the actions are based on beliefs that are justified, and generally we should not blame others for acting on the basis of justified beliefs. Human beings have no choice but to act on the basis of beliefs that may prove false; if we act only on the basis of justified beliefs then generally we have done all that morality can reasonably demand.

The defender of the Balancing Approach might nonetheless ask: Why isn't it reasonable, and therefore excusable, to intentionally kill another human being, even if she is probably not a combatant, provided the number of lives you might save are substantially greater (though not far greater) than the number of lives you would take?

The most straightforward response draws on the Kantian idea that generally it is impermissible to treat a person as a mere means to an end. In my view, to harm a person as a means is to harm her in order to bring about some desired result or consequence. To harm someone as a *mere* means is to harm her as a means when she has done nothing to make herself liable to be harmed as a means, for in that case you cannot justify harming her by reference to her own voluntary actions. Finally, to *treat* someone as a mere means is to harm her as a means when you do not reasonably believe that she is liable to be harmed as a means. If I intentionally harm one person to prevent harm to others then I harm the first person as a means. However, if I reasonably believe that she is liable to be harmed then I do not *treat* her as a *mere* means. By contrast, if I do not reasonably believe that she is liable to be harmed then by harming her to prevent harm to others I impermissibly treat her as a mere means.

If the reasonable belief threshold is a general feature of moral justification and excuse, then soldiers can justify or excuse the intentional killing of another human being only if they act on an affirmative and reasonable belief that the individual killed is a combatant. It follows that

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<sup>86</sup> See R.A. DUFF, ANSWERING FOR CRIME 267-68 (2007) ("A belief is justified if there are good reasons for accepting it, reasons at least as good as those for rejecting it; it is unjustified if there are no, or insufficient, reasons for accepting it").

their reasons to believe that the individual is a combatant must be at least as strong as their reasons to believe that the individual is a civilian. Put another way, soldiers cannot reasonably believe that an individual is a combatant if they have reason to believe that she is *probably* a civilian or have *most* or *strongest* reason to believe that she is a civilian. The reasonable belief threshold therefore rejects the counterintuitive implications of the Balancing Approach discussed in Part II on the basis of a general moral theory of justified and excused action.

Importantly, a well-trained soldier can form and act on reasonable beliefs rapidly and reliably under pressure.<sup>87</sup> Military training already aims to sharpen situational awareness and streamline information processing so that soldiers immediately pick out relevant features of their surroundings and swiftly form judgments regarding their tactical situation. No doubt, some soldiers will panic under fire and shoot anything that moves. However, we must not lower our moral, legal, and professional standards to accommodate soldiers overwhelmed by their circumstances; rather we must properly train soldiers to rise and meet otherwise justified standards even in the most difficult circumstances. In addition, political leaders and military commanders should not place soldiers in tactical situations in which meeting justified standards will prove too much for too many of even the best-trained soldiers.

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The preceding moral argument for the reasonable belief threshold is supported by general principles of criminal law.<sup>88</sup> However, three aspects of the criminal law governing justification and excuse warrant brief discussion. First, leading criminal law scholars agree that a reasonable

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<sup>87</sup> It may be worth noting that a soldier need not think to herself ‘I believe that individual is a combatant for the following reasons . . .’ in order to believe that individual is a combatant for those reasons. Reasonable belief does not require an internal monologue.

<sup>88</sup> See, e.g., Wayne LaFare, 2 Subst. Crim. L. § 10.4 (2d ed.) (concluding that “the case law and statutory law on self-defense generally require that the defendant’s belief in the necessity of using force to prevent harm to himself be a reasonable one, so that one who honestly though unreasonably believes in the necessity of using force in self-protection loses the defense.”); *id.* (“There is a little authority that an honest [but unreasonable] belief in the necessity of self-defense will do . . . . Only a few of the modern codes have adopted this position.”). Similarly, a Canadian defendant pleading self-defense must believe, “on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.” Criminal Code, R.S.C., ch. C-46, § 34(2) (1985) (Can.).



belief that a justifying circumstance exists provides a justification only if the belief is true but only an excuse if the belief is false.<sup>89</sup> However, many jurisdictions do not systematically distinguish between justifications and excuses.<sup>90</sup> As a result, many jurisdictions regard a defendant who reasonably but mistakenly believes that a justifying circumstance exists as justified rather than excused. For our purposes, what is important is that, under either approach, an actor must reasonably believe that the justifying circumstance exists in order to escape moral blame and criminal liability.

Second, in most jurisdictions, a defendant who intentionally kills another person, whom she believes is liable to be killed, may be convicted of nothing if her belief is reasonable and but may be convicted of murder if her belief is unreasonable.<sup>91</sup> In other jurisdictions, a defendant who kills in the unreasonable belief that the individual killed posed a lethal threat will be granted a partial or ‘imperfect’ defense and will only be liable for second degree murder or manslaughter.<sup>92</sup> For our purposes, what is crucial

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<sup>89</sup> See, e.g., GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 762–69 (1978); JOHN GARDNER, *OFFENCES AND DEFENCES* 110 (2007) (“Thus the most basic or rudimentary case of non-technical excuse remains that of unjustified action upon justified belief.”); Paul H. Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 *UCLA L. Rev.* 266, 271–73, 283–84 (1975).

<sup>90</sup> Indeed, the Model Penal Code does not even recognize excuses as a distinct category of affirmative defenses, preferring to lump duress (an excuse) with complicity (a mode of responsibility) and entrapment (a bar to prosecution) under the capacious heading of General Principles of Liability. See MPC art. 2. See also Wayne LaFare, 2 *Subst. Crim. L.* § 9.1 (2d ed.) (discussing the MPC approach and concluding that “[i]n those instances in which the defendant is mistaken in his belief, what is called a justification would seem more properly characterized as an excuse”).

<sup>91</sup> See, e.g., LaFare, § 10.4 (2d ed.); *People v. Goetz*, 68 N.Y.2d 96, 506 N.Y.S.2d 18, 497 N.E.2d 41 (N.Y.1986) (observing that this approach “provide[s] either a complete defense or no defense at all to a defendant charged with any crime involving the use of deadly force.”).

<sup>92</sup> See, e.g., Illinois Criminal Code § 9–2 (second degree murder); Pennsylvania Consolidated Statutes § 2503(b) (voluntary manslaughter); *In re Christian S.*, 7 Cal.4th 768, 30 Cal.Rptr.2d 33, 872 P.2d 574 (1994) (voluntary manslaughter). Similarly, under the Model Penal Code a defendant who kills in the mistaken belief that the individual killed posed a lethal threat will be liable for murder if that belief was formed due to extreme recklessness; manslaughter if that belief was formed due to ordinary recklessness; and negligent homicide if that belief was formed due to criminal negligence. See MPC §3.09.

is that a defendant must affirmatively and reasonably believe that the justifying circumstance exists to escape moral blame and criminal liability.

Finally, the reasonable belief threshold applies to ordinary individuals and government agents alike. For example, law enforcement officers are justified or excused in using deadly force only if they reasonably believe that a justifying circumstance exists: for example, that such force is necessary to defend themselves or others or to prevent the escape of certain dangerous suspects.<sup>93</sup> Similarly, under the European Convention on Human Rights, “the use of force by agents of the State . . . may be justified . . . where it is based on an honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken.”<sup>94</sup> Finally, in the United States a police officer acts unconstitutionally by using deadly force absent a reasonable belief that a fleeing suspect poses a threat to public safety.<sup>95</sup>

<sup>93</sup> See, e.g., New York Penal Law 35.30(1); Cal. Penal Code § 835a. Similarly, under the Model Penal Code, a law enforcement officer will be held criminally liable for using deadly force based on a recklessly or negligently formed belief that the relevant justifying circumstances exist. See MPC 3.07 & 3.09(2). Cf. Commission on Accreditation for Law Enforcement Agencies, Inc., Standards for Law Enforcement Agencies 1-2 (1983) (italics deleted) (concluding that police departments must restrict the use of deadly force to situations in which “the officer reasonably believes that the action is in defense of human life . . . or in defense of any person in immediate danger of serious physical injury.”).

<sup>94</sup> *McCann v. United Kingdom*, 21 ECHR 97 GC, para. 200. See also *id.* para. 134 (“The relevant domestic case-law establishes that the reasonableness of the use of force has to be decided on the basis of the facts which the user of the force honestly believed to exist: this involves the subjective test as to what the user believed and an objective test as to whether he had reasonable grounds for that belief.”) (citing *Lynch v. Ministry of Defence* [1983] Northern Ireland Law Reports 216; *R v. Gladstone Williams* [1983] 78 Criminal Appeal Reports 276, 281; and *R v. Thain* [1985] Northern Ireland Law Reports 457, 462).

<sup>95</sup> See *Tennessee v. Garner*, 471 U.S. 1, at 21 (1984) (finding that police officer “could not reasonably have believed that [the suspect]—young, slight, and unarmed—posed any threat.”). See also *Price v. Sery*, 513 F.3d 962, 969 (2008). (“Sincerely held but unreasonable belief does not justify the use of force under *Garner*, *Graham*, or our own precedents.”) Although U.S. courts often use the phrase “probable cause” to describe the level of certainty required by the U.S. Constitution, courts have uniformly held that, when it comes to the use of deadly force, probable cause and reasonable belief are equivalent requirements. See, e.g., \_\_\_\_\_. Certainly there is no indication that the U.S. Constitution permits police to intentionally kill fleeing suspects whom they do not reasonably believe pose a threat to the public.

### C. ABOVE THE THRESHOLD

Are soldiers who satisfy the minimum threshold and reasonably believe that an individual is a combatant free to fire at will? They are not. Since a soldier's reasons not to kill civilians are substantially stronger than her reasons to kill combatants, her reasons to believe that an individual is a combatant must be *equally substantially* (or *proportionately*) stronger than her reasons to believe that the individual is a civilian. Put another way, since killing a civilian generally is substantially worse than allowing a soldier to be killed, it is impermissible to intentionally kill an individual unless the *expected* harm (that is, the possible harm discounted by its probability) of mistakenly sparing her is *equally substantially* (or *proportionately*) greater than the expected harm of mistakenly killing her.

For example, imagine that you are remotely operating a UAV and see several armed men on your monitor. The men's weapons, age, dress, and movements provide you with strong reasons to believe that they are insurgents. However, demographic and cultural patterns provide you with strong reasons to believe that the men are civilians armed and organized to defend themselves and their community from insurgent attacks. Suppose that, even if the men are combatants, they pose no immediate threat to anyone and it is highly unlikely that they will kill a substantial number of soldiers or civilians before being captured or killed in a future engagement. In such a scenario, it would be wrong to kill the men even if your reasons to believe that they are opposing combatants are as strong or slightly stronger than your reasons to believe that they are civilians.

What, then, should you do? If possible, you should track the men's movements and kill them only if new information provides you with *conclusive* reason to believe they are combatants; with *much stronger* reason to believe that they pose an immediate threat to a comparable number of soldiers or civilians than to believe that they pose no such threat; or with *most* reason to believe that they pose an immediate threat to a substantially greater number of soldiers or civilians. Put another way, you should only kill the men if you are *reasonably convinced* that they are combatants; if you are *reasonably certain* that they are about to attack a comparable number of soldiers or civilians; or if you *reasonably believe* that they are about to attack a substantially greater number of soldiers or civilians. However, if such time and resources cannot be spared to obtain additional information and reduce the risk of mistakenly killing civilians, then you must disengage and accept the risk of mistakenly sparing combatants.

So, although a reasonable belief that an individual is a combatant is always *necessary* to excuse intentionally killing her, it is often not *sufficient*. As the relative costs of a false negative decrease, one's level of certainty must increase. In other words, above the reasonable belief threshold the Modified Balancing Approach seems plausible: the required level of certainty should vary with the relative costs of error, adjusted to reflect the moral asymmetry between killing and letting die. It is only below the reasonable belief threshold that even the Modified Balancing Approach loses its plausibility.

If we embrace Deontological Targeting and reject the Balancing Approach, must we accept that it is *never* permissible for a soldier to intentionally kill an individual who is probably a civilian (that is, whom the soldier has strong reasons to believe is a combatant but stronger reasons to believe is a civilian)? Not necessarily. So-called 'threshold deontologists' generally believe that it is permissible to intentionally kill an innocent person in extreme circumstances to prevent far greater harm to others. These threshold deontologists may also accept that it is permissible to intentionally kill an innocent person to prevent far greater *expected* harm to others (that is, the harm that killing her might prevent discounted by the likelihood that killing her will prevent that harm). In other words, if it is permissible to intentionally kill an innocent person if the number of innocent people this would save exceeds some numerical threshold then it may be permissible to kill an innocent person if the *expected* number of innocent people this would save (that is, the number of innocent people this might save discounted by the likelihood that this would save them) exceeds the same numerical threshold. It might therefore be permissible for a soldier to intentionally kill an individual who is probably a civilian to prevent far greater *expected* harm to others (that is, the harm killing her would prevent if she turns out to be a combatant discounted by the likelihood that she is a combatant). However, since it is hardly ever the case that intentionally killing an individual who is probably a civilian will prevent far greater expected harm to others, the reasonable belief threshold is, for all practical purposes, absolute.

Significantly, Deontological Targeting entails that there may be cases in which it would be permissible to intentionally kill an individual whom one reasonably believes is a combatant to prevent substantially (but not far) greater harm to others but impermissible to intentionally kill an individual whom one has strong but not decisive reason to believe is a combatant to prevent substantially greater harm to others. For example, suppose you receive reliable human and signals intelligence that a specific insurgent will open fire with a concealed firearm at a specific time and

location. At that time and location, you see an individual whose facial and physical appearance closely matches that of the insurgent and whose clothing and behavior is strongly corroborative of an intended attack. Under such circumstances, if non-lethal options are not available, it may be permissible to attack the individual, even if such an attack would unintentionally kill two nearby civilians, to prevent substantially greater harm to others. However, if you see three individuals who closely resemble the insurgent then even if you reasonably believe that one of them is the insurgent you cannot reasonably believe that each of them is the insurgent. Under these circumstances, it would be impermissible to attack each individual unless doing so would prevent far greater harm to others even though in both cases you would kill one combatant and two civilians.

This implication of Deontological Targeting may seem paradoxical but it should not. By definition, every nonconsequentialist moral view holds that it is sometimes permissible to bring about good outcomes in one way but not in another way. If the distinctions between intentionally and unintentionally killing civilians and between reasonable and unreasonable belief in justifying circumstances are morally significant then this necessarily entails that we are sometimes permitted to unintentionally kill civilians as a side-effect but not to intentionally kill individuals as a means whom we do not reasonably believe are combatants.

#### D. AN ALTERNATIVE CONSIDERED

In a forthcoming article, Lt. Col. Geoffrey Corn proposes that a soldier may intentionally kill an individual if the soldier either (a) *reasonably suspects* that the individual is a member of an opposing regular armed force or (b) believes based on a *preponderance of the evidence* that the individual is a civilian directly participating in hostilities.<sup>96</sup> While I respect Corn's military experience and appreciate the thought he has devoted to this difficult topic, I find his proposal very difficult to accept. For one thing, it is not clear why the required level of certainty that an individual is liable to attack should vary with the different possible bases of liability to attack (membership in an armed force, direct participation in hostilities, and so forth). Of course, it generally will prove easier to satisfy the required level of certainty while fighting a regular armed force than while fighting an irregular armed group, since relevant information will be

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<sup>96</sup> See Geoffrey S. Corn, *Targeting, Command Judgment, and a Proposed Quantum of Proof Component: A Fourth Amendment Lesson in Contextual Reasonableness*, 77 BROOKLYN L. REV. \_\_ (2012).

more accessible and less ambiguous. But the required level of certainty should remain the same.

On my view, a soldier may not intentionally kill another human being unless the soldier reasonably believes that human being is a member of a regular armed force, a civilian directly participating in hostilities, or otherwise liable to attack. Reasonable suspicion is not enough. If you have reason to suspect that an individual is liable to attack then you should investigate further. But if your reasons to conclude that an individual is liable to attack are outweighed by your reasons to conclude that she is not liable to attack then you are neither justified nor excused in attacking her.

The reasonable belief threshold I defend may seem quite close to the preponderance of the evidence standard Corn applies to civilians directly participating in hostilities. However, while the moral basis of the reasonable belief threshold lies in a general theory of justification and excuse, the moral basis of Corn's proposal remains unclear. For example, Corn writes that nothing less than a preponderance of the evidence can rebut the presumption that civilians are illegitimate targets. However, the law is full of presumptions that can be rebutted by more or less than a preponderance of the evidence.<sup>97</sup> Indeed, Corn himself writes that the presumption that civilian *objects* are not liable to attack can be rebutted by something less than a preponderance of the evidence, namely probable cause (which Corn defines as a 'fair probability') to believe that a civilian object has been converted into a military objective by its nature, purpose, location, or use.<sup>98</sup> More generally, when we say that a soldier may not attack a civilian unless and for such time as that civilian directly participates in hostilities, we are not asserting an evidentiary presumption and describing the evidence that would rebut that presumption; rather, we are asserting a substantive rule and describing a substantive exception to that rule. The pressing question is how certain the soldier must be that the substantive exception applies in a particular case before attacking a particular civilian. The key to answering this pressing question lies not in the evidentiary concepts of presumption and rebuttal, as Corn suggests, but in the moral concepts of justification and excuse, as I have argued.

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<sup>97</sup> For example, in a criminal trial, the presumption of innocence can be rebutted only by proof beyond reasonable doubt.

<sup>98</sup> Corn writes that probable cause that a civilian is directly participating in hostilities is not sufficient to warrant intentionally killing that civilian because it "fails to exclude alternate probabilities—it merely creates one among several." *Id.* at [43]. However, preponderance of the evidence does not exclude alternate possibilities either—it merely identifies one as more probable than the others.

Finally, Corn makes no attempt to explain how the required level of certainty varies above the minimum thresholds he proposes, saying only that “a more demanding quantum may evolve over time as a matter of operational practice.”<sup>99</sup> This is a serious limitation, since it would be wrong to intentionally kill a human being (who turns out to be a civilian) based on a bare preponderance of the evidence that she is a combatant if the costs of mistakenly sparing her (if she turned out to be a combatant) are very low. For example, if an individual poses no immediate threat to anyone then it would be wrong to kill that individual if it is only slightly more probable that the individual is a combatant than that she is a civilian. As I have argued, reasonable belief sets a minimum threshold of certainty that soldiers must achieve before attacking any individual. Moreover, above the minimum threshold of reasonable belief the required level of certainty reflects both the relative costs of error and the moral asymmetry between killing and letting die.

#### IV. DEONTOLOGICAL FEASIBILITY

This article began with two questions: First, how sure must soldiers be that an individual is a combatant rather than a civilian before attacking her? Second, how much risk to herself, her unit, or her mission must a soldier accept in order to reduce the risk of mistakenly killing a civilian? This part argues that the second question should be answered by reference to the first. Specifically, soldiers must accept any personal or operational risks necessary to achieve the required level of certainty. If soldiers are unable to reach the required level of certainty, or if they are unwilling to accept the risks necessary to do so, then they must hold their fire, even if that forbearance will leave them at greater risk.

The position that soldiers must take all necessary risks to reach the required level of certainty may seem demanding, but it follows logically from the discussion so far. The required level of certainty already takes into account the cost of attack (that one might kill a civilian) and the cost of restraint (that one might spare a combatant who may kill one or more fellow soldiers). If the required level of certainty is higher than the minimum threshold of reasonable belief then this means that the cost of restraint is less than the cost of attack. If the cost of verification (that one might come under attack while seeking additional information) is greater than the cost of restraint, then the soldiers may choose the less costly option and hold their fire. If the cost of verification is less than the cost of

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<sup>99</sup> *Id.* at [44-45].

restraint, then the cost of verification must also be less than the cost of attack. Either way, the cost of verification cannot justify attack when the required level of certainty has not been reached.<sup>100</sup>

Importantly, it is the responsibility of military planners to train and equip their soldiers to verify the legitimacy of their targets in the safest way possible. Tactical and technological innovation can substantially reduce, though never eliminate, the risks involved in distinguishing civilians from combatants. Undeniably, soldiers facing a non-uniformed enemy force will often find that reaching the required level of certainty will require accepting serious risks that they or their fellow soldiers will be killed. In individual cases, accepting such risks will require soldiers to display tremendous moral integrity and psychological fortitude. Over the length of an irregular conflict, accepting such risks will mean that a significant number of soldiers will be killed while attempting to verify the legitimacy of their targets. The moral and strategic implications of such losses are obvious. However, armed forces must not reduce or avoid such losses by inflicting comparable losses on the civilian population. Instead, military commanders must train and equip their forces to reduce the risks of verification; prepare their forces to accept any remaining risks of verification; and, whenever possible, avoid placing their forces in situations in which the risks of verification are individually too difficult to bear or collectively too difficult to sustain. As General David Petraeus observes, “to be brutally frank about it, if your overriding objective is to protect your own force, then you probably should not have deployed in the first place, because the only way to avoid risk to your forces is not to get involved.”<sup>101</sup>

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<sup>100</sup> Rogers reaches a similar conclusion regarding air attacks on ground targets:

If [an aircrew’s] assessment is that (a) the risk to them of getting close enough to the target to identify it properly is too high, (b) that there is a real danger of incidental death, injury or damage to civilians or civilian objects because of lack of verification of the target, and (c) they or friendly forces are not in immediate danger if the attack is not carried out, there is no need for them to put themselves at risk to verify the target. Quite simply, the attack should not be carried out.

Rogers, at 179.

<sup>101</sup> Interview with Gen. David Petraeus, *FRONTLINE: RULES OF ENGAGEMENT*, PBS (Feb. 19, 2008),



In addition to their specific obligation to take all necessary risks to achieve the required level of certainty, soldiers have a general obligation to take additional risks to obtain additional information regarding potential targets. Soldiers who seek additional information regarding potential targets often increase the risk that they will be killed, while soldiers who do not seek such additional information often increase the risk that they will kill civilians. As we saw in section I.C, according to the Balancing Approach, a precaution is feasible just in case the humanitarian considerations in favor of taking the precaution outweigh the military considerations against taking the precaution; a precaution is infeasible just in case the military considerations against taking the precaution outweigh the humanitarian considerations in favor of taking the precaution. This suggests that soldiers need not seek additional information regarding potential targets if seeking that additional information would increase the risk to soldiers even slightly more than obtaining that additional information would decrease the risk to civilians.

However, as we saw in section II.C, generally it is substantially worse for soldiers to kill a civilian than to allow a fellow soldier to be killed. It follows that generally it is substantially worse for a soldier to increase the risk that she may kill a civilian than to increase the risk that she may allow a fellow soldier to be killed. Therefore, a soldier must seek additional information regarding potential targets unless seeking that additional information would increase the risk to soldiers substantially more than obtaining that additional information would decrease the risk to civilians. For example, if killing a civilian is at least twice as bad as allowing a soldier to be killed then soldiers must seek additional information regarding the legitimacy of their targets unless seeking additional information would increase the risk that soldiers will be killed at least twice as much as obtaining additional information would decrease the risk that the soldiers will kill civilians.

Importantly, the two obligations described above—the specific obligation to take all necessary risks to achieve the required level of certainty, and the general obligation to take additional risks to obtain additional information regarding potential targets—are distinct and operate independently of one another. The specific obligation reflects the relative costs of attack and costs of restraint, while the general obligation reflects the relative risks of attack and risks of verification. The risks of verification can never justify attacking without the required level of certainty for the reasons described at the beginning of this section. The

risks of verification can justify failing to obtain information that would *further* reduce the risk of attack to civilians, but only if seeking that information would further increase the risk to soldiers to a substantially greater degree. Put the other way around, soldiers are obligated to further reduce the risks of attack if they can do so without a substantially greater further increase to the risks of verification.

The general obligation described above is inspired by an important recent proposal by David Luban.<sup>102</sup> Luban argues that soldiers must use more discriminating tactics (such as engaging with opposing forces in close combat) rather than less discriminating tactics (such as engaging with opposing forces from afar using artillery and air power) unless using the more discriminating tactics would increase the marginal risk to soldiers substantially more than using the less discriminating tactics would reduce the marginal risk to civilians.<sup>103</sup>

My proposal differs from Luban's in at least two ways. First, my proposal is concerned with determining *whether* an individual is liable to attack (distinction), while Luban's proposal is mostly concerned with determining *how* to attack individuals who are liable to attack (discrimination). However, this difference is not dispositive, because both my proposal and Luban's can be generalized to apply to all precautions in attack: soldiers should take additional precautions to avoid harming civilians unless taking these precautions would increase the marginal risk to soldiers substantially more than taking these precautions would decrease the marginal risk to civilians.<sup>104</sup> This general principle should guide both target verification and selecting means and methods of attack.<sup>105</sup>

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<sup>102</sup> David Luban, *Risk Taking and Force Protection*, in READING WALZER (Itzhak Benbaji & Naomi Sussman eds., 2011)

<sup>103</sup> Luban defines the marginal risk to soldiers (or civilians) as the difference between the risks to soldiers (or civilians) if the soldiers use more discriminating tactics and the risks to soldiers (or civilians) if the soldiers use less discriminating tactics. *Id.* at [20].

<sup>104</sup> In this context, the marginal risk to soldiers (or civilians) is the difference between the risks to soldiers (or civilians) if the soldiers take some precaution and the risks to soldiers (or civilians) if the soldiers do not take that precaution.

<sup>105</sup> In the target verification context, the marginal risk to soldiers (or civilians) is the difference between the risks to soldiers (or civilians) if the soldiers obtain more information and the risks to soldiers (or civilians) if the soldiers obtain less information.

The more important difference between Luban's proposal and my own is that I ground the duty of soldiers to accept risks to themselves rather than impose risks on civilians on the moral asymmetry between killing and letting die, while Luban grounds this duty on "the vocational core of soldiering."<sup>106</sup> I suspect that professional obligation is an infirm point on which to balance risk to soldiers and risk to civilians. Evidently, professional obligations are created, sustained, and defined by social conventions including laws, codes of conduct, and custom. Yet the laws of armed conflict are indeterminate, rules of engagement vary with each armed force and each armed conflict, and state practice as a result remains unsettled. Moreover, an armed force may opt out of whatever convention exists, rejecting the professional obligations associated with it, and construct their professional identity through a different set of norms, values, and ideals.<sup>107</sup> Of course, defecting from a social convention can be a moral wrong in itself, if the convention has a compelling moral justification.<sup>108</sup> However, the most compelling moral justification for the social convention that Luban supports is the moral asymmetry between killing and letting die.

From a soldier's perspective, the marginal risk to civilians is the marginal risk of *killing* the civilians, while the marginal risk to soldiers is the marginal risk of *allowing* them to be killed. The risk is not simply that an equivalent harm will befall either a civilian or a soldier, but rather that the soldier will commit a more serious moral wrong or a less serious moral wrong. Luban treats the death of a soldier and the death of a civilian as equally bad events, an equal loss of human life, and it is only the soldier's professional obligations that require her to risk the former before risking the latter. But this is misleading. Killing a civilian is an action, not merely an event, and the moral weight of an action is a function not only of its outcome but also of its causal and intentional structure. Soldiers should accept greater risks to themselves in order to avoid imposing smaller risks

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<sup>106</sup> Luban, at 28.

<sup>107</sup> Similarly, McMahan goes somewhat astray when he argues that "[t]he reason why combatants are required to expose themselves to risk in the course of defending those who are threatened with wrongful harm is simply that it is their job to do that: it is what they have pledged to do and are paid to do. It is part of their professional role." McMahan, at 366. The goal of the inquiry is to determine what level of risk the role-based duties of soldiers should require soldiers to accept, and on pain of circularity this determination cannot rest on the role-based duties of soldiers to accept risk.

<sup>108</sup> See, e.g., JEREMY WALDRON, *TORTURE, TERROR, AND TRADE-OFFS* 80 (2010).

on civilians, not because the lives of civilians are worth more than the lives of soldiers but because killing is worse than letting die.<sup>109</sup>

## V. IMPLEMENTATION

This part distills the complex moral principles defended in the previous parts into relatively simple rules that soldiers can be trained to follow even under fire. Section A proposes new LOAC/IHL rules as well as reinterpretations of existing LOAC/IHL rules. Section B translates these legal rules into model Rules of Engagement for training soldiers and guiding their conduct on the battlefield.

### A. LOAC/IHL

The most elegant way to incorporate the moral principles defended in the previous parts into the LOAC/IHL would be for states to adopt three new legal rules either as part of a new international convention or as the basis for new customary international law. The first rule would essentially codify the *Galić* dictum:

[A] person shall not be made the object of attack when it is not reasonable to believe, in the circumstances of the person contemplating the attack, including the information available to the latter, that the potential target is a combatant.<sup>110</sup>

In addition, a new rule could be adopted regarding the level of certainty required above the reasonable belief threshold:

A person shall not be made the object of attack unless the risk to attacking forces of sparing that person, or the reasonably anticipated concrete and direct military advantage of attacking that person, is substantially greater than the risk that the person is a civilian.

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<sup>109</sup> Luban invokes the asymmetry between killing and letting die in a separate discussion of whether soldiers may unintentionally kill foreign civilians to prevent their own civilians from being killed, Luban at [33], but not to determine when soldiers may risk killing civilians to reduce the risk of being killed themselves.

<sup>110</sup> Galić, para. 50.

Finally, a new legal standard could be adopted to govern precautions in attack generally:

Attacking forces shall take every effective precaution to spare civilians unless taking a precaution will increase the risk to attacking forces substantially more than taking that precaution will decrease the risk to civilians.

These three rules would identify both the level of certainty that soldiers must achieve and the level of risk that soldiers must accept. By following these rules soldiers can ensure that their use of lethal force will prove either justified (if the targeted individual turns out to be a combatant) or excused (if the targeted individual turns out to be a combatant).

Alternatively, existing legal rules could be interpreted by states as well as by international courts to reflect the relevant moral principles. As we saw in part I, Protocol I fails to specify either the level of certainty necessary to ‘verify’ that an individual or object is military rather than civilian or the level of risk that is ‘feasible’ for soldiers to accept in order to discharge their precautionary obligations. The principle of verification could be interpreted along the following lines:

Those who plan or decide upon an attack shall

(i) do everything *possible* to verify that the persons to be attacked are not civilians but are combatants unless seeking additional information would increase the risk to soldiers substantially more than obtaining such information would decrease the risk to civilians;

(ii) do everything *necessary* to verify that the persons to be attacked are more likely combatants than civilians;

(iii) do everything *necessary* to verify that the persons to be attacked are sufficiently likely to be combatants that the risk of sparing them is substantially greater than the risk that they are civilians.

These specifications reflect the complementary goals of error reduction and error distribution: soldiers should gather as much reliable information as

they can without increasing the risk to themselves substantially more than they would decrease the risk to civilians; and soldiers must put themselves and their mission at as much risk as necessary to achieve the required level of certainty.

We also saw that the principle of doubt either fails to identify the standard of certainty relevant to targeting decisions, sets that standard too low, or permits the standard to vary without limitation based on the relative costs of error. Instead, the principle of doubt should set a minimum threshold of certainty and allow the required level of certainty to vary only above that threshold:

In case of doubt whether a person is a civilian, that person shall be considered to be a civilian unless there is reason to believe that she is probably a combatant; a person may be attacked only if any remaining doubt is sufficiently small that the risk of sparing her is substantially greater than the risk that she is a civilian.

Similarly, the principle of apparent protection seems to permit a soldier to carry out an attack unless it becomes subjectively apparent to the soldier that the target is almost certainly not a combatant but rather a civilian. This principle should be interpreted to require that, at a minimum,

An attack shall be cancelled or suspended if there is reason to believe that the objective is probably not a military one or is probably subject to special protection.

Interpreting existing LOAC/IHL rules along these lines will incorporate into international law the minimum threshold of reasonable belief applicable in all cases; the required level of certainty applicable when the threshold has been satisfied; and the level of risk required to avoid mistakenly killing civilians.

## B. RULES OF ENGAGEMENT

The new rules and interpretations of existing rules proposed above enhance the determinacy of existing LOAC/IHL. However, here as elsewhere the price of greater determinacy is greater complexity. While military commanders and operational planners often will have access to legal advisors, we cannot expect soldiers under fire to apply complex legal standards to every targeting decision they make. Instead, military

commanders should issue Rules of Engagement (ROE), written in ordinary language, which soldiers can be trained to apply in combat. Such ROE will inevitably simplify the underlying LOAC/IHL rules, but such simplification is legitimate so long as soldiers will better conform to the LOAC/IHL rules *indirectly*, by following the ROE, than *directly*, by attempting to apply the LOAC/IHL rules under adverse conditions.

In general, soldiers need just one rule:

Don't shoot anyone unless

(a) you *reasonably believe* that he poses an immediate threat to several members of your unit or to several civilians;

(b) you are *reasonably certain* that he poses an immediate threat to yourself, another member of your unit or a civilian; or

(c) you are *convinced* that he is a combatant, even though he poses no immediate threat to you or others.

In the vast majority of engagements, individual soldiers will make better decisions by following this ROE than by attempting to calculate the required level of certainty on a case-by-case basis, balancing military and humanitarian considerations adjusted by the moral asymmetry between killing and letting die. By contrast, the teams of military and intelligence personnel who remotely operate UAVs generally have the time, resources, personal safety, and direct access to legal advisors needed to make more precise judgments and directly follow the LOAC/IHL norms proposed in the previous section.

Importantly, in special operations targeting a high-level combatant the long-term danger of sparing that combatant may be very high even if that combatant poses no immediate threat. In such cases, it may be appropriate for commanders to issue mission-specific ROE permitting soldiers to intentionally kill an individual whom they reasonably believe to be that particular combatant even if the individual poses no immediate threat. However, it is impermissible to intentionally kill an individual whom you do not reasonably believe is a particular combatant unless killing that particular combatant would prevent far greater harm to others before a better opportunity to kill that combatant arises.

The United States and its allies have issued ROE that substantially overlap with the ROE proposed above. For example, ROE issued to

coalition forces in Iraq in 2005 provide that “Positive Identification (PID) is required prior to engagement. PID is a reasonable certainty that the proposed target is a legitimate military target.”<sup>111</sup> It is not clear, however, whether under this ROE “a reasonable certainty” requires soldiers to achieve a specific, moderately high level of certainty or merely directs soldiers to achieve whatever level of certainty seems reasonable under the circumstances. Evidently, soldiers receive greater guidance when they are told what level of certainty to achieve than when they are told to figure out for themselves what level of certainty to achieve. Moreover, a variable standard of certainty would introduce all the problems of the Balancing Approach directly into the ROE. On the other hand, a single standard of ‘reasonable certainty’ may prove too restrictive when the stakes are very high, too permissive when the stakes are very low, and too vague standing alone. The proposed ROE is intended to give soldiers specific guidance in recurring situations, limit the inherent vagueness of language by situating each level of certainty in relation to the others, and not overwhelm soldiers with rules that are too fine-grained to apply under pressure. Finally, the U.S. has permitted soldiers to intentionally kill individuals without positively identifying them as legitimate targets, for example in ‘free-fire zones’ from which civilians have been warned to leave as well as in buildings or areas declared ‘hostile’ prior to attack. By contrast, the rules proposed above permit no such derogation.

In his own work on targeting, Rogers proposes the following ROE:

Are you sure that the target is a military objective? If you are in any doubt, would you or friendly forces be placed in danger if the attack were not carried out? If not, the attack is NOT to be carried out.<sup>112</sup>

Though instructive, the ROE proposed by Rogers do not help soldiers who are not sure that a target is a military objective (that is, they are in some doubt) but who reasonably believe that friendly forces would be placed in some danger if the attack were not carried out. How are soldiers supposed to balance substantial doubts against substantial dangers, substantial risks to civilians against substantial risks to soldiers? Rogers does not say. The ROE proposed by Rogers are silent not only with respect to the likelihood that the risks will materialize but also with respect to the magnitude of

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<sup>111</sup> GARY D. SOLIS, *THE LAW OF ARMED CONFLICT* 516 (2010) (quoting MNC-I ROE Card issued to coalition forces in Iraq).

<sup>112</sup> Rogers, at 179.



those risks. How much doubt is acceptable if many friendly soldiers would be placed in danger if the attack were not carried out? Only a few? Only oneself? On all of these questions the ROE proposed by Rogers are silent, while the ROE proposed above offers meaningful guidance.

Importantly, the proposed ROE is intended to guide, not replace, human judgment. That is why, like all ROE, the rule proposed must be incorporated into Situational Training Exercises (STEs) in which soldiers are taught to apply their ROE in scores of realistic combat simulations. In addition, like all ROE, this rule can form the basis of (real and hypothetical) case studies through which soldiers learn to recognize scenarios in which the use of force is, or is not, appropriate. These exercises will clarify any linguistic ambiguities in the wording of the ROE and convert rules into reflexes. Soldiers must often rely on pattern recognition as much as rule application, refined instinct as much as careful calculation. So long as their training is grounded in sound legal and moral norms, soldiers can trust themselves to make legally and morally sound decisions even while under fire.<sup>113</sup>

## CONCLUSION

This article began with two questions: First, how certain must a soldier be that a given individual is a combatant and not a civilian before attacking that individual? At a minimum, a soldier must reasonably believe that the individual is a combatant and not a civilian. Above the reasonable belief threshold, the required level of certainty will vary with the relative costs of error and reflect the moral asymmetry between killing and letting die. If an individual is not in a position to kill several soldiers or civilians then that individual may not be attacked unless the attacker is reasonably certain or even convinced that the individual is in fact a combatant.

Second, what risks must soldiers accept to themselves and to their mission in order to reduce the risk of mistakenly killing civilians? Soldiers must take whatever personal or operational risks are necessary to reach the required level of certainty. Soldiers must also seek additional information unless seeking additional information would increase the risk to the soldiers substantially more than obtaining additional information would decrease the risk the soldiers impose on civilians. If soldiers are unwilling or unable to take the required risks then they must hold their fire.

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<sup>113</sup> See, e.g., Jørgen Weidemann Eriksen, *Should Soldiers Think before They Shoot?*, 9 JOURNAL OF MILITARY ETHICS 195 (2010).

Unavoidably, this article has left several important questions unanswered. *How much* worse is it to kill a civilian, intentionally and unintentionally, than to allow one's fellow soldiers to be killed? How should we compare harm to civilians with military advantages *other* than preventing harm to one's fellow soldiers? These are difficult questions that any morally serious approach to armed conflict must address.<sup>114</sup> Fortunately, the progress we have already made gives us reason to believe that these questions also have answers.

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<sup>114</sup> Among other things, proper application of the principle of proportionality depends on the answers. See Haque, *Proportionality (in War)*. Elsewhere I have suggested that the value of a military advantage just is the resulting reduction in the losses to one's forces necessary to achieve one's overall war aims. See Haque, *Criminal Law and Morality at War*.